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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1024~~. 685 375

MOSES WILLIAMS, AS ASSIGNEE IN BANKRUPTCY OF JOHN HEARD, AUGUSTINE HEARD AND ALBERT F. HEARD, PLAINTIFF IN ERROR,

vs.

JOHN HEARD, AUGUSTINE HEARD AND ALBERT F. HEARD.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED JUNE 21, 1888.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between John Heard, of Ipswich, in the county of Essex, in said State of Massachusetts, Augustine Heard, of the city, county, and State of New York, and Albert F. Heard, of said Boston, plaintiffs, and Moses Williams, of Brookline, in said State of Massachusetts, in his capacity as asssignee in bankruptcy of said plaintiffs, defendant in a plea of contract, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the eighth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
MARCUS MORTON,
Chief Justice of Supreme Judicial Court.

1—1024

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

And now here the judges of the supreme judicial court of the Commonwealth of Massachusets, holden at Boston, within and for the county of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court, have hereto set my hand and the seal of said court this sixteenth day of June, A. D. 1888.

[SEAL.] JOHN NOBLE, *Clerk.*

2½ *Bond to Party on Writ of Error.*

Know all men by these presents that we, Moses Williams, assignee in bankruptcy of John Heard, Augustine Heard, and Albert F. Heard, said Williams being of Brookline, Massachusetts, and Otis E. Weld, of Boston, Massachusetts, are held and firmly bound unto said John Heard, Augustine Heard, and Albert F. Heard, in the full and just sum of twenty-five hundred dollars, to be paid to the said John Heard, Augustine Heard, and Albert F. Heard, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at a sitting of the supreme judicial court for the county of Suffolk, in the Commonwealth of Massachusetts, to wit, on June 5, 1888, in a suit at law depending in said court between said John Heard, Augustine Heard, and Albert F. Heard, as plaintiffs, and said Moses Williams, as assignee as aforesaid, as defendant, judgment was rendered against the said Moses Williams, as assignee as aforesaid, and the said Moses Williams, assignee as aforesaid, having obtained a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation, directed to the said John Heard, Augustine Heard, and Albert F. Heard, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Moses Williams, as assignee as aforesaid, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

MOSES WILLIAMS, *Assignee.* [L. S.]
OTIS E. WELD. [L. S.]

Signed, sealed, and delivered in presence of—
DAVID L. HODGES.
Boston, June 7, 1888.
Approved:
H. W. PUTNAM,
Att'y for the Pl'ffs.
Approved:
MARCUS MORTON,
Chief Justice of Supreme Judicial Court.

2¾ A true copy of the bond taken by the chief justice at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the supreme judicial court for the county of Suffolk, in the Commonwealth of Massachusetts.

Attest: JOHN NOBLE,
Clerk of Sup. Jud. Court for Suffolk County.

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, holden at Boston, within and for our county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred and eighty-eight, to the first day of January, A. D. 1889, it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

[SEAL.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of James Sturgis and Arthur Pickering, both of Boston, in said county, to the value of twenty-five thousand dollars, and for want thereof to take the bodies of the said defendants (if they may be found in your precinct) and safely keep, so that you have them before our justices of our supreme judicial court, next to be holden at Boston, within and for said county of Suffolk, on the first Monday of April next, then and there in our said court to answer unto John Heard, of Ipswich, in the county of Essex and Commonwealth aforesaid, Augustine Heard, of New York, in the county and State of New York, and Albert F. Heard, of said Boston, in an action of contract, to the damage of the said plaintiffs (as they say) the sum of twenty-
5 five thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ with your doings therein.

Witness Marcus Morton, Esquire, at Boston, the nineteenth day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN NOBLE, *Clerk.*

COUNTY OF SUFFOLK, *ss:*

I, Henry W. Putnam, on behalf of the plaintiffs in this writ, before the service thereof, on oath, declares that he verily believes the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

HENRY W. PUTNAM.

Subscribed and sworn to this 2d day of April, A. D. 1887.
D. G. HASKINS, JR.,
Justice of the Peace.

Upon which writ is endorsed the following acknowledgment of service, viz:

BOSTON, *March 19th,* 1887.

The undersigned defendants in the within writ hereby accept service on the same.

JAMES STURGIS.
ARTHUR PICKERING.

6 And upon the day on which said writ was returnable the plaintiffs, upon entering the same, filed their declaration as follows, to wit:

Plaintiffs' Declaration.

SUFFOLK, *ss:*

Supreme Judicial Court.

JOHN HEARD *et al. vs.* JAMES STURGIS *et al.*

And the plaintiffs say the defendants owe them thirteen thousand six hundred and twelve and $\frac{85}{100}$ dollars ($13,612.85) for money received by the defendants to the plaintiffs' use, being the amount paid to the defendants by the United States of America on account of war premiums of insurance paid by the plaintiffs during the war of the rebellion, between April 13, 1861, and April 9, 1865.

H. W. PUTNAM,
Att'y for Plaintiffs.

Filed Apr. 4, 1887.
Att: HENRY A. CLAPP,
Ass't Clerk.

7 This action was entered in our said supreme judicial court on the 4th day of April, A. D. eighteen hundred and eighty-seven, when and where the parties appeared, and the defendants, by M. and C. A. Williams, Esquires, their attorneys, on the third day of May, in said year, filed their answer as follows, to wit:

Answer of Defendants.

SUFFOLK, *ss:*

Supreme Judicial Court.

JOHN HEARD *et al. v.* JAMES STURGIS *et al.*, Assignees.

MAY 3, 1887.

These defendants for answer deny each and every allegation, item, and particular in the plaintiffs' writ and declaration contained.

By M. & C. A. WILLIAMS,
Def'ts' Attorneys.

Filed May 3, 1887.
Att: JOHN NOBLE, *Clerk.*

8 And on said third day of May an agreed statement of facts was filed as follows, to wit:

Agreed Statement of Facts.

SUFFOLK, *ss:*

Supreme Judicial Court. April Term, 1887.

JOHN HEARD *et al. v.* JAMES STURGIS *et al.*

The plaintiffs, citizens of the United States, were engaged between April 13, 1861, and April 9, 1865, as partners under the firm name of Augustine Heard and Company, in the business of buying and shipping steamers for China, receiving merchandise from China and selling the same, and insuring merchandise and vessels. During that period the plaintiffs bore true allegiance to the Government of the United States, and, after the sailing of the first Confederate cruiser, they made, in the course of their business, certain enhanced payments of insurance, otherwise called payments of premiums for war risks or war premiums, on merchandise and vessels to an amount exceeding the sum awarded on their account by the Court of Commissioners of Alabama Claims, as hereinafter set forth.

9 On May 31, 1865, the said firm of Augustine Heard and Company was dissolved by the agreement of the members thereof. On August 5, 1875, the plaintiffs were severally adjudicated bankrupts in the U. S. district court for the district of Massachusetts. On September 11, 1875, assignments in bankruptcy in the usual form were made to the defendants, and on July 20, 1877, the plaintiffs received their discharge in bankruptcy. The said firm and each of the plaintiffs individually were solvent when said firm was dissolved, and all the debts owed by the plaintiffs at the time of their said adjudication in bankruptcy were incurred after said dissolution. The estate of said bankrupts received by the defendants hitherto has been insufficient to pay in full the debts of the bankrupts.

In December, 1886, an award was made by the Court of Commissioners of Alabama Claims established under the act of Congress

approved June 5, 1882, to the defendants as assignees in bankruptcy of the plaintiffs in proceedings in said court, to which the plaintiffs in this action were parties, on account of the said payments of war premiums by the plaintiffs, and was in part paid to the defendants by the United States. Of the sum so awarded and paid there
10 remains in the hands of the defendants, after paying the reasonable expenses of prosecuting the claim before said court of commissioners and collecting the award, the sum of thirteen thousand six hundred and twelve and $\frac{85}{100}$ ($13,612.85) dollars. The amount of the Geneva award remaining unappropriated was insufficient to pay the war-premium awards in full.

The treaty of Washington, between the United States and Great Britain, promulgated July 4, 1871; the decisions rendered by the tribunal of arbitration at Geneva, and the final decision and award made by said tribunal on September 18, 1872; the acts of Congress of June 23, 1874, and of June 5, 1882, respectively, creating and re-establishing the Court of Commissioners of Alabama Claims, the several acts of Congress relating to the said courts and the payment of their awards, are to be treated as facts in this case and may be referred to at the argument.

No controversy or question exists between the parties as to the proportions in which the several plaintiffs are entitled, if at all, to the sum recovered, or as to the distribution of the same; and it is agreed that if upon the foregoing facts the plaintiffs are enti-
11 tled to recover, judgment is to be entered for them and the case is to stand for the assessment of damages; otherwise judgment for the defendants. It is further agreed that in either event the expenses of this action and reasonable counsel fees to each party may be paid out of the fund in the defendants' hands.

H. W. PUTNAM,
Att'y for Plaintiffs.
M. & C. A. WILLIAMS,
Att'ys for Defendants.

Filed May 3d, 1887.
Att.: JOHN NOBLE, *Clerk.*

Thereupon, upon the case stated by the parties, the same was entered in the full court for its consideration and determination.

And on the twenty-fifth day of April, A. D. eighteen hundred and eighty-eight, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

12 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, April, 1888.

In the case of John Heard *et al. vs.* James Sturgis *et al.*, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment for the plaintiffs.
Case to stand for assessment of damages.
By the court:

HENRY A. CLAPP, *Clerk.*

April 25, 1888.

And said rescript was entered by our said court accordingly.

13 And on the first day of June, A. D. eighteen hundred and eighty-eight, the plaintiffs appeared by Henry W. Putnam, Esquire, their attorney, and filed their suggestion of the death of one defendant, the resignation of the other defendant, and appointment of Moses Williams as assignee, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

JOHN HEARD *et al. vs.* JAMES STURGIS *et al.*

MAY, 1888.

And now come the plaintiffs in the above-entitled action and suggest that one of the defendants, James Sturgis, has died since the commencement of the action, and the other defendant, Arthur Pickering, has resigned his office as assignee in bankruptcy of the plaintiffs, in which capacity as assignees said defendants held the money sued for. The plaintiffs also suggest that Moses Williams, of Brookline, in the county of Norfolk and Commonwealth aforesaid, has been duly appointed assignee in bankruptcy of the plaintiffs by the district court of the United States for the district of Massa-
14 chusetts, in which district said bankruptcy proceedings were instituted and are pending, and they pray that said Williams, in his capacity as assignee as aforesaid, be cited in, as defendant in this action, to abide the final judgment of this court.

JOHN HEARD,
ALBERT F. HEARD,
AUGUSTINE HEARD, *Plaintiffs,*
By their att'y, HENRY W. PUTNAM.

Whereupon said Moses Williams filed his appearance as defendant in the words following, to wit:

SUFFOLK, *ss:*

Supreme Judicial Court.

JOHN HEARD *et al v.* JAMES STURGIS *et al.*

JUNE, 1888.

And now comes the said Moses Williams, assignee as aforesaid, and appears as defendant in the aforementioned action by—

M. & C. A. WILLIAMS,
Att'ys for Def'ts.

Filed June 1, 1888.
Att.:

C. H. COOPER,
Ass't Clerk.

15 And on the fifth day of said June an agreement as to the assessment of damages was filed as follows, to wit:

SUFFOLK, *ss:*

Supreme Judicial Court.

JOHN HEARD *et al. v.* JAMES STURGIS *et al.*

JUNE 5, 1888.

It is hereby agreed that damages may be assessed in the above-entitled action in the sum of $10,000.00.

H. W. PUTNAM,
Att'y for Pl'ffs.
M. & C. A. WILLIAMS,
Att'ys for Def'ts.

Whereupon the plaintiffs, by their attorney aforesaid, filed their motion for judgment as follows, to wit:

SUFFOLK, *ss:*

Supreme Judicial Court.

JOHN HEARD *et al.* } No. 3737.
v.
JAMES STURGIS *et al.* }

JUNE 5, 1888.

And now come the plaintiffs and move that judgment be entered in the above case for the plaintiffs in accordance with the
16 rescript of the supreme judicial court for the Commonwealth on file therein.

H. W. PUTNAM,
Pl'ffs' Att'y.

Filed June 5, 1888.
Att.: C. H. COOPER,
Ass't Clerk.

Thereupon the following order was entered, to wit:

JUNE 5TH, 1888.

Let judgment be entered in accordance with the agreement of the parties.

W. A. FIELD, *J. S. J. C.*

It was thereupon considered by our said supreme judicial court, on the fifth day of June, A. D. eighteen hundred and eighty-eight, that the said John Heard, Augustine Heard, and Albert F. Heard recover against the said Moses Williams, as he is assignee in bankruptcy of said plaintiffs, the sum of $10,000 damages, and costs of suit, taxed at forty-four dollars and twenty-one cents ($44.21).
17 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Marcus Morton, Esquire, chief justice of our said supreme judicial court, at Boston, this sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] JOHN NOBLE,
Clerk Sup. Jud. C't.

18 IV.

The following is the assignment of errors:

19 *Assignment of Errors.*

In the Supreme Court of the United States.

MOSES WILLIAMS, Assignee, Plaintiff in Error,
v.
JOHN HEARD and Others.

The plaintiff in error in this cause avers that the supreme judicial court within and for the county of Suffolk and Commonwealth of Massachusetts erred in the rendition of judgment in this cause in favor of the plaintiffs in the cause in said court, to wit, John Heard, Augustine Heard, and Albert F. Heard, and against this plaintiff in error—defendant in said court—in the sum of ten thousand dollars and costs, and assigns the following errors, to wit:

First. The court erred in such judgment because it allowed the said bankrupts, John Heard, Augustine Heard, and Albert F. Heard, to recover of their assignee in bankruptcy money which had been expressly awarded to such assignee's predecessors in office, as assignees, by the Court of Commissioners of Alabama Claims, established by act of Congress approved June 5, 1882, when said
20 money so awarded by said Court of Commissioners of Alabama Claims to said assignee's predecessors in office as assignees was legally and of right the lawful property of said assignee by virtue of said award of said Court of Commissioners of Alabama Claims, in pursuance of said act of Congress, of the treaty of Washington, between the United States and Great Britain, promulgated July 4, 1871; the decisions rendered by the tribunal of arbitration at Geneva under said treaty; the act of Congress of June 23, 1874, and the act of Congress of June 5, 1882.

Second. The court erred in such judgment against this plaintiff in error upon the facts stated in the record, because the award of the money in controversy to said assignee's predecessors in office was a final and conclusive determination under said acts of Congress that the money in controversy was the property of said assignee's predecessors in office, and hence now of said assignee.

Third. The court erred in such judgment against the plaintiff in error, because upon the facts stated in the record the money
21 in controversy, which was awarded to the said assignee's predecessors in office on account of the payment by the defendants in error, during the war of the rebellion, of enhanced pre-

miums of insurance on account of the depredations of Confederate cruisers upon the commerce, ships, and cargoes of the citizens of the United States, was part of the sum paid by Great Britain to the United States under the treaty of Washington as indemnity for the harm done to citizens of the United States by reason of the aid given by Great Britain to Confederate cruisers, and because the payment by said defendants in error of said war premiums gave them, from the time of such payments, a just claim against Great Britain, which the sovereign Government of the United States was justified in enforcing in their behalf, which claim the defendants in error possessed at the time of their bankruptcy and which passed by the assignment in bankruptcy to said assignee's predecessors in office, and which made the money awarded by said Court of Commissioners of Alabama Claims the absolute property of said assignees and of the plaintiff in error, as their successor, for distribution to the creditors of said bankrupts.

22 Fourth. Said court erred in said judgment against the plaintiff in error, because, upon the facts stated in the record, if the money distributed by the United States to those who had paid war premiums during the rebellion was a mere gratuity, as being paid upon claims which were not valid claims against Great Britain, the defendants in error had no legal claim to recover this money from the plaintiff in error simply because the sovereign Government of the United States had elected, in pursuance of acts of Congress, to award this money to the plaintiff in error through its Court of Commissioners of Alabama Claims, the decision of said Court of Commissioners being final in determining that the plaintiff in error is entitled to the money.

Fifth. Said court erred in said judgment against said plaintiff in error, because if said award to the plaintiff in error was a mere gratuity there was no privity or legal consideration between the parties to support an action in which the defendants in error could recover said money from the plaintiff in error.

23 Sixth. Said court erred in said judgment against said plaintiff in error, because the money received by the United States from Great Britain and not needed for the satisfaction of the claims of citizens of the United States awarded by the first Court of Commissioners of Alabama Claims was not money which the United States ought justly to have returned to Great Britain, as being paid by mistake, but was money to which the citizens of the United States had a good moral claim, and hence the assignees in bankruptcy took a valid title to it under their assignment.

Seventh. The said court erred in the rendition of said judgment in construing the act of Congress of June 23, 1874, chap. 459, 18 Statutes, 245.

Eighth. The said court erred in the rendition of said judgment in construing the act of Congress of June 5, 1882, c. 195, 22 Statutes, 98.

Ninth. The said court erred in the rendition of said judgment in construing the treaty between the United States and Great Britain, commonly called the Treaty of Washington, concluded May 8,

1871, and proclaimed July 4, 1871. U. S. Rev. Stats, Pub. Treaties, page 355.

Tenth. The said court erred in the rendition of said judgment, in this, that it assumed to decide a matter in controversy be-
24 tween bankrupts and their assignees in bankruptcy, and thereby assumed jurisdiction of a matter wholly within the cognizance of the district court of the United States, in which said proceedings in bankruptcy were pending, which court alone had jurisdiction of said subject-matter in controversy.

Eleventh. The said court erred in the rendition of said judgment, in this, that it assumed jurisdiction of and decided against the right of this plaintiff in error a question arising under a treaty of the United States and under statutes of the United States, of which question the Court of Commissioners of Alabama Claims had exclusive jurisdiction.

Wherefore the plaintiff in error prays that said judgment may be reversed.

By M. & C. A. WILLIAMS,
Attorneys for said Plaintiff in Error.

Filed June 8, 1888.
Att.: JOHN NOBLE, *Clerk.*

25 V.

The following is the application for the writ of error:

26 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

JOHN HEARD *et al.*, Plaintiffs,
v.
MOSES WILLIAMS, Assignee, Defendant.

JUNE, 1888.

To the Honorable Marcus Morton, chief justice of the supreme judicial court of Massachusetts:

The defendant in this cause complains that on June 5, 1888, judgment was entered by the supreme judicial court aforesaid within and for the county of Suffolk, in said Commonwealth, in favor of the plaintiffs in this cause in the sum of ten thousand dollars and costs against the defendant in this cause in his capacity as assignee in bankruptcy of said plaintiffs.

That said judgment was rendered in this cause, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a
27 statute of or authority exercised under said State of Massachusetts on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question

the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and that a manifest error hath happened in the rendition of said judgment, to the great damage of the said defendant, as he is deprived thereby of the sum of ten thousand dollars and costs of this suit, which sums he is entitled to and ought of right to have and hold in his capacity as assignee in bankruptcy of said plaintiffs.

Wherefore said defendant, in order that said error may be duly corrected, prays that you will allow to him a writ of error from the Supreme Court of the United States, and that you will issue a citation to said plaintiffs upon said writ of error, so that said Supreme Court may cause further to be done therein to correct that
28 error what of right and according to the laws and custom of the United States should be done.

MOSES WILLIAMS,
Assignee in Bankruptcy of John Heard et al.

Presented and filed June 8, 1888.
Attest: JOHN NOBLE, *Clerk.*

29 The following are the opinions of the supreme judicial court for the Commonwealth:

VI. Certificate of reporter.
VII. Opinions of full court.

30 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 12, 1888.

I certify the annexed to be a true copy of the opinion and dissenting opinion of the supreme judicial court in the case of John Heard *et al. vs.* James Sturgis *et al.*, decided on the twenty-fifth day of April, 1888.

WILLIAM V. KELLER,
Reporter of Decisions.

31 JOHN HEARD *et al. vs.* JAMES STURGIS *et al.*

HOLMES, *J.*:

The plaintiffs in this case are parties who paid enhanced pre-iums for insurance on war risks in 1861–1865.

The defendants are their assignees in bankruptcy under an assignment made in 1875. They have received money from the United States according to a decision of the Court of Commissioners of Alabama Claims under the act of Congress of June 5, 1882, in respect of the war pre-iums paid by the plaintiffs, and the question is whether they are entitled to hold that money under the assignment, which it will be noticed was made before the act was passed, by force of which the money was paid by the United States.

It is settled that the adjudication of the commissioners is not conclusive between the parties. That adjudication only decides upon the amount and validity of the claim as against the United
32 States; sets apart and identifies the fund for the benefit of whoever ultimately may prove entitled to it under the proper construction of the statute, and leaves the rights of all persons claiming to be entitled to the sum awarded to the ordinary course of proceeding in the established courts. Leonard *v.* Nye, 125 Mass., 455, 466; Comegys *v.* Vasse, 1 Pet., 193, 212. The Court of Commissioners have expressed and acted on this view of the law. McLean *v.* United States, Davis' Reports of Dec. of Commissioners, 112; 44th Cong., 2nd sess., Senate Ex. Doc. 21; the Bankruptcy Question, March, 1884, in Rules, Opinions, &c., of Court of Com'rs of Alabama Claims, Washington, 1885. The only question is whether the right of the defendants is equally established by Leonard *v.* Nye and Comegys *v.* Vasse, or whether there is a satisfactory distinction to be taken between those cases and the case at bar.

There is no need of stating in detail well-known cases in easily accessible reports. It is enough to say that the American de-
33 cisions establish that when this Government collects a sum from a foreign government in respect of wrongs to our citizens and subsequently passes a law to distribute the fund collected to the parties wronged, this Government is to be regarded as having stood from the beginning *quasi* in the position of an agent to collect on behalf of its subjects and trustee of the fund when collected, and thus that the payment when made is to be treated as if made in pursuance of a duty on its part and in satisfaction of a vested right of the subject, and not as a pure gratuity and gift. Comegys *v.* Vasse, Leonard *v.* Nye, *ubi supra*; Bachman *v.* Lawson, 109 U. S., 659, 663; Gracie *v.* New York Ins. Co., 8 Johns., 237, 245. So as to claims against the Government for proceeds of captured property. Erwin *v.* United States, 97 U. S., 392. It follows from this view and it is decided that such claims pass to an assignee in bankruptcy or insolvency under an assignment earlier in date than the act
34 providing for the payment of the claim. Leonard *v.* Nye, *ubi supra*; Jones *v.* Dexter, 125 Mass., 469; Comegys *v.* Vasse, *ubi supra*; Phelps *v.* McDonald, 99 U. S., 298; Plater *v.* Scott, 4 Gill & Johnson, 116.

We are bound by these decisions as far as they go. Undoubtedly, if the acts with which they deal had been in force before the respective assignments, no one would have felt any hesitation about the result, merely by reason of his opinion as to the relations of subject and sovereign, on the impossibility of the former having a right in a strict juridical sense against the latter; and perhaps it would not have mattered whether the sum given by the act was a pure gratuity or was founded upon a moral consideration, so long as the Government positively undertook to pay. Compare *ex parte* Haggins, 21 Ch. D., 85; *ex parte* Webber, 18 Q. B. D., 111. Undoubtedly, too, an act may be passed at any time providing expressly or by implication that the sum distributed shall be paid to the use of
35 such persons as would hove been entitled at the time of pay-

ment, if the claims forming the moral consideration of the statute had been legal claims from the beginning. Furthermore, there is a very intel-igible reason for giving that effect to a statute which distributes a fund collected, as we have supposed, to sufferers in respect to whose sufferings the claim was collected. The commercial and practical, rather than strictly juridical, light in which we are in the habit of regarding the sovereign power makes it natural and easy to adopt such a view.

But it must be remembered, whenever a new statute comes up for consideration, that although it may be found by construction to give what it gives as if in pursuance of a legal duty, there is no such legal duty in fact and no antecedent right on the part of the persons who receive its benefits. It is only tautologous to say that the law knows nothing of moral rights unless they are also legal rights, and
36 from before the days of Hobbes the argument has been public property that there is no such thing as a right created by law as against the sovereign who makes the law by which the right is to be created. Barnard *v.* Rodocanachi, 7 App. Cas., 333, 336, Hobbes, De Cive, c. 6, § 14 (Op. Lat., II, 227); Leviathan, c. 26, Eng. Works, III, 250–252; Sir John Eliot, De Jure Maiestatis, c. 3; Bodin, De Republica, I, c. 8; Bentham's Fragment on Government, Ch. 5, Works, I, 292, 293; Austin, Jurisprudence, sect. 6, 3rd Ed., pp. 286, 287.

In every case, then, some reason must be found, either in the words of the distributing statute or in what we have called the moral consideration for it, as that the fund if received by a private person would have been charged with a trust, or that the sovereign but for his sovereignty would be bound to indemnify the distributees for some previous loss before the distribution can be regarded as anything more than a simple gift.

37 In the present case there is no pretense that the United States received the money paid over by the Geneva award upon any trust in favor of those who paid war premiums, even in the attenuated sense in which it may be said to have done so, for those vessels were destroyed by the Alabama, &c. On the contrary, claims for war premiums, as such, were expressly withdrawn from the consideration of the Geneva tribunal. Protocols 5, 6, & 7 of the conferences of the arbitrators, Messages and Documents Dep't of State, part 2, vol. 4, 1872, 1873, pp. 19–22. The corner-stone of the decision in Leonard *v.* Nye is wanting. The ground on which that case went may be seen from the following extract from the opinion:

"The claims for the destruction of property of citizens of the United States by the Alabama and the Florida, and by the Shenandoah after her departure from Melbourne, through the violation by Great Britain of her international duty, were claims for which
38 the owners of the property destroyed were fully entitled to compensation from Great Britain, although they could not obtain their rights in the ordinary course of judicial proceedings, but only by petition to the British Government or through the interposition of their own Government. Compensation for these losses was demanded by the United States from Great Britain as a matter

of right, and as such was awarded by the decision of the tribunal of arbitration created by the treaty between the two Governments. The act of Congress for the adjudication and disposition of the moneys received from Great Britain pursuant to that decision provided for their application to the payment of claims directly resulting from the damage caused by those insurgent cruisers, and the sum awarded to this defendant by the commissioners appointed under that act of Congress was upon such a claim. It must, therefore, be treated as awarded and paid to him by reason of his interest in property
39 so destroyed, and of his right to compensation for its destruction, and as capable of passing by an assignment from him, in any form recognized by law, though made after the destruction of the property and before the award of indemnity." 125 Mass, 465, 466. This language follows the same lines as Comegys *v.* Vasse, and marks the limit beyond which we cannot go.

We do not understand it to be argued that the plaintiffs had any claim against the United States Government for indemnity irrespective and outside of a claim sounding in trust against the fund received from Great Britain, so that, apart from trust, the allowance made by the statute should be construed as recognizing a pre-existing obligation.

The allowance is in respect of war premiums generally. It is not confined to those which possibly might found a claim by way of subrogation to the insurer on the ground that they were paid to mutual companies and were used to pay losses. Inasmuch
40 as presumably the cost of the war premiums in general ultimately fell upon the purchasers of insured goods, a claim against the Government for indemnity in respect of them would resolve itself finally into a claim of all the members of the community for increased cost of living on account of the war.

If the plaintiffs had no claim for indemnity against the United States it is not material whether they had a claim against Great Britain or not, so long as no part of the fund received by the United States was paid in respect of any such claim; but it may be noticed that the Geneva tribunal—certainly a respectable authority—expressed the opinion "that these claims do not constitute, upon the principle of international law applicable to such cases, good foundation for an award of compensation or compensation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award." Protocol V, *ubi supra.*

41 Even if the United States had not yielded to this opinion, but still asserted a liability on the part of Great Britain, such an assertion would not be equivalent to an assertion of its own liability to indemnify its citizens; and, as it certainly now has admitted such a liability and has received no money from Great Britain in respect to the claims, there are no grounds outside the words of the act of 1882 for saying that it recognizes a pre-existing right against the United States on the part of all those who paid war premiums.

The decisions to which we have adverted do not go on the language of the statutes which were under discussion, but upon the

nature of the claim, forming what we have called the moral consideration for the respective acts. There is nothing decisive in the language of the act before us, but the circumstances and the words used are at least as favorable to the view that this payment of war premiums was, by way of gratuity, as to any other. The act was
42 not passed until the persons whose claims were within the scope of the Geneva award had been satisfied, and dealt with a surplus left over from the sum in gross awarded. Claims under the act for war premiums are subordinated to claims for destruction of property. And it may be noticed, for what it is worth, that while the act of June 23, 1874, § 12, provides for deducting compensation or indemnity received by the party injured, or his assignees, the act of 1882, § 6, does not mention assignees and does not use the word compensation, but only "indemnity, dividend, set-off," &c., possibly indicating a recognition that the "claims" upon the Alabama fund created by the statute were claims in respect of which no one ever had had a right to compensation, and which had never passed by an assignment, because they had no existence until the statute created them. This construction is helped by the
43 well-known fact that Congress hesitated long between several competing applicants for a share in the surplus fund, including the insurance companies and the Treasury itself.

If the sum in controversy was a pure gift to the plaintiffs, to which they had no claim as of right in any sense, it did not pass to their assignees, Emerson *v.* Hall, 13 Pet., 409; Gillan *v.* Gillan, 55 Penn. St., 430. Even if assignees in bankruptcy are universal successors, they succeed only to the rights and interests which the bankrupt has at the time—not, of course, to anything which he afterwards may acquire by a title wholly subsequent. U. S. Rev. Sts., § 5044. Executors stand in a different position. They "represent the person of their testator." St. 9, Ed. III.; St. 2, C. 3; Littleton, § 337; Overton *v.* Sydall, Popham, 120, 121; S. C. Gouldsb., 120, pl. 6; Boyer *v.* Rivet, 3 Balstr., 317, 321; Bain *v.* Cooper, 1 Dowl., Pr. Cas., N. S., 11, 14. They would take if their testator had died before the act of 1882 was passed, and if the will con-
44 tained a residuary clause it might be construed to apply to the sum received by them as representing him, in accordance with the rule laid down by Lord Hardwicke in Green *v.* Ekins, 2 Atk., 473, 476, that "if the personal estate is increased by any event after the death of the testator it is part of the residue and will pass as such." Grant *v.* Bodwell, 78 Maine, 460, 465; Pierce *v.* Stidworthy, Maine (March 4, 1887, 11 Eastern Rep., 438). Our decision is in accordance with Brooks *v.* Ahrens, Md. court of appeals, Jan. 5, 1888. Taft *v.* Marsily, supreme court N. Y., Jan. 1888.

Judgment for the plaintiff.

45 *Dissenting Opinion.*

JOHN HEARD *et al. vs.* JAMES STURGIS *et al.*

FIELD, *J.:*

I cannot assent to the opinion of the court.

It is said that the plaintiffs in the case at bar had no right or property in any claim to be repaid the war premiums paid by them until this right or property was created by the act of June 5, 1882; that Great Britain paid no money to the United States on account of war premiums, and that no trust in any sense in favor of the plaintiffs attached to the money received under the Geneva award, and that, therefore, in 1875, when the plaintiffs became bankrupts and an assignment of their property in the usual form was made to the defendants, as their assignees, the plaintiffs had no property in the claim which could pass under the assignments.

In Leonard *v.* Nye, 125 Mass., 455, the defendant was ad-
46 judged a bankrupt in Feb'y, 1868, and in Jan'y, 1875, he presented a claim to the Court of Commissioners of Alabama Claims for damages sustained by the destruction of merchandise by the "Shenandoah" after her departure from Melbourne, and a sum of money was awarded to him as damages on April 5, 1876, which was paid him on Sept. 15, 1876, and the plaintiff, being the defendant's assignee in bankruptcy, recovered it in the suit. It is said in the opinion that although the assignment in bankruptcy was before the treaty of Washington and before the passage of the act of June 23, 1874, yet the money must "be treated as awarded and paid to him by reason of his interest in property so destroyed and of his right to compensation for its destruction, and as capable of passing by an assignment from him in any form recognized by law, though made after the destruction of the property and before the award of indemnity." The distinction between that case and this is
47 that the money paid by Great Britain was paid and received as compensation for the destruction of property, in which was included the property of the defendant in Leonard *v.* Nye, but was not paid or received as compensation for the war premiums which the plaintiffs in the case at bar had paid.

The case of Leonard *v.* Nye states the settled law of the United States as to money paid to the claimants under the statute of June 23rd, 1874, and other similar statutes. Erwin *v.* U. S., 97 U. S., 392; Backman *v.* Lawson, 109 U. S., 659; Phelps *v.* McDonald, 99 U. S., 298; Comegys *v.* Vasse, 1 Pet., 193; U. S. *v.* Hunter, 5 Mason 62; S. C. 5 Pet., 173; Frevall *v.* Boche, 14 Pet., 95; Milner *v.* Metz, 16 Pet., 221. The decision of the House of Lords in Bernard *v.* Rodocanachi, 7 App. Cas., 33, is clearly the same as would have been rendered here, whatever criticisms might be made upon some of the language found in the opinions.

48 The money awarded under the St. of 1874 or the St. of 1882, was perhaps, in a strict legal sense, a gift by the United States, because the United States were under no legal obligation to

pay the money received from Great Britain to any one, neither was Great Britain, in the matter of the Alabama claims, under any legal relation to citizens of the United States. U. S. *v.* Dickinson, 92 U. S., 520, 524. But governments often recognize obligations towards each other or towards their own citizens, or towards citizens or subjects of foreign States, which are analogous to the obligations enforced in judicial courts between litigants. To what extent they will do this, when they will follow and when depart from the rules which prevail in judicial courts, is in the discretion of the sovereign power, and in the case at bar it must be determined from the acts of Congress whether the money thereby appropriated was intended as a gratuity or as compensation for services rendered or for money paid or for property taken or
49 destroyed. Milnor *v.* Metz, 16 Pet., 221.

It is apparent, I think, that the United States in enacting the statutes of 1882, as well as the statute of 1874, did not intend that the money appropriated to claimants under these acts should be a gratuity, because it is appropriated on account of a loss of property and as compensation for the loss for which claim had been made from a time anterior to the treaty of Washington. If the United States had submitted the distribution of the funds received from Great Britain to the judicial courts without any directions other than those which the rules of municipal jurisprudence afford, it may be that the fund would have been distributed among the owners of property destroyed by the inculpated cruisers, or the representatives or assigns of such owners, and that insurance companies which had paid a loss would have been subrogated to the rights of the assured; but Congress saw fit to give explicit directions in regard to
50 the appropriation of the money in both the act of 1874 and in that of 1882. Neither of these statutes deal with any money except that received from the Geneva award, and Congress, by these statutes, has in fact appropriated it all to the payment of claims for the loss of property and for the expenses of the Court of Commissioners, and Congress was the only tribunal competent to determine to whom and in what manner, if at all, the money should be appropriated and the claims satisfied. If Congress intended by these statutes to appropriate the money to certain persons as a gratuity, the only matters for the Court of Commissioners to deal with would have been the persons intended by the statutes and the amounts given to each, and it is difficult to see how a judicial court could re-examine the distribution made by the Court of Commissioners unless the persons to whom that court awarded the money claimed and received it in some representative capacity. The judicial courts determine the ownership of the money awarded only on the ground that it follows the ownership of
51 the property as compensation for which the awards were made. Congress did not, however, in these statutes specify the persons entitled to receive the money otherwise than by describing the claims to be admitted, except that it provided for the exclusion of claims for the loss of property insured to the extent of the indemnity received from the insurance for the use of other per-

sons, and that no claim should be allowed "in favor of any person not entitled at the time of the loss to the protection of the United States in the premises," nor "in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States." The Court of Commissioners were, under the act of 1874, to adjudicate upon all claims admissible under the act "directly resulting from damage caused by the inculpated cruisers," and, under the act of 1882, upon claims "directly resulting from damage done on the high seas by Confederate cruisers during the late re-
52 bellion," and "claims for the payment of premiums for war risks." Under each of these statutes the Court of Commissioners held that the persons to present the petition were the persons who owned the property damaged or who had paid the the war premiums or their personal representatives, if they were dead; or their assigns, if the claims had been assigned either by voluntary conveyance or by operation of law, although an assignee might prosecute the claim in the name of the assignor, or the assignor might prosecute it if the assignee did not intervene. The practice and proceedings under which assignees in bankruptcy were admitted as claimants were established under the act of 1874 and were well known when the act of 1882 was passed, and that statute provides "That the practice and proceedings established and directed by said chapter four hundred and fifty-nine shall be followed and held in regard to all claims provable under this act, and it shall be the duty of the said court hereby re-established, in the mode and subject to
53 all the conditions, limitations, and provisions of said chapter '459,' except as changed and modified by this act, to receive and examine the claims mentioned in section five of this act." The claimants for property destroyed and for war premiums paid both made their claims originally on the grounds of natural justice and international obligation, but until the treaty the rules by which the conduct of Great Britain was to be tested were in dispute between the Governments, and the fact that Great Britain had violated those rules was first conclusively established by the Geneva award. It was for the United States to determine on what trusts, if any, they received the money and to appropriate it as they saw fit, and it is not competent for this court to decide whether Congress in fact rightly appropriated it or not. If these acts of Congress appropriated the money to certain persons as a gratuity the awards of the Court of Commissioners must be held by the judicial courts as gifts,
54 but if these acts appropriated the money as a compensation for the loss of property the judicial courts must so treat the awards. The legal connection between the awards and the money received from Great Britain or the awards and the money appropriated by the United States is established by the acts of Congress, construed in connection with the subject and the circumstances, and not by any opinion of a moral equity not recognized by the acts. The question whether any distinction could be recognized between claims under the acts of 1874 and claims under the acts of 1882 in reference to the rights of assignees in bankruptcy or assignees under voluntary assignments was presented before the Court of Commis-

sioners, and it was decided in an elaborate opinion that no distinction could be made. It was said in the opinion that "neither of the acts can properly be regarded as creating a bounty for
55 the claimants. Both alike were the acts of the sovereign State dispensing justice and not distributing alms to its citizens." "Our Government had always insisted that all these claims were just demands upon Great Britain, and the acts of 1874 and 1882 reaffirmed that position and provided a way by which all these sufferers might be reimbursed to the extent of the fund awarded at Geneva, giving the preference to those who had sustained direct losses; and this recognition of the rights of the claimants in this fund must be held to relate back to the time when these losses occurred." Opinion of French, J., No. 13, Court of Commissioners of Alabama Claims.

A similar question arising in the administration of the estates of deceased persons has been decided in the same way and on the same reasons by the supreme judicial court of Maine in Grant *v.* Bodwell, 78 Maine, 460, and in Pierce *v.* Stidworthy, in March, 1887.
56 The supreme court of New York in Taft *v.* Maisily, and the court of appeals of Maryland in Brooks *v.* Ahrens, in January, 1888, decided that the money appropriated by the act of 1882 was a gratuity, and that no claim existed before the passage of the act which would pass to assignees in bankruptcy. In the opinions in these last two cases Emerson *v.* Hale, 13 Pet., 409, is cited as authority. In that case Chew, Emerson & Loraine were, respectively, collector, surveyor, and naval officer of the port of New Orleans, and they seized and procured the condemnation of the brig Josepha Secunda for an infraction of the laws against the slave trade, and by the district court they were allowed one-half of the proceeds. This part of the decree was reversed by the Supreme Court of the United States on the ground that the statutes giving one-half of the proceeds of condemned property to the seizing officers did not apply to such a case. The seizure was in 1818. In 1828 Emerson died, leaving heirs. On March 3, 1831, Congress passed an act
57 entitled "An act for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edward Loraine, deceased." The act directed the district court to pay over the one-half of the proceeds "to the said Beverly Chew and the legal representatives of the said William Emerson and Edward Loraine, respectively." A part of this money was received by the minor children of Emerson, as his legal representatives, and the suit was to compel the tutor and curator of those children to pay out of this money a judgment which had been recovered against Emerson in his lifetime.

The court held that it was a gift by Congress; that the act intended that the money should be paid to the heirs of Emerson as the persons designated in the act as his legal representatives. The language of the act of Congress, as construed by the court, shows that it was not the intention of Congress that the money should be paid as a part of the estate of Emerson, but should be given to his heirs.

58 In Milnor *v.* Metz, 16 Pet., 221, Milnor and Thompson had been *guagers* at the port of Philadelphia for the years 1835 & 1837, upon a salary of $1,500 a year. The act of July 4, 1836, reduced the duties on wines, under which they were required to re-*guage* the wines. They presented a memorial to Congress in January, 1838, for extra pay for these services. In December, 1838, Milnor applied for the benefit of the insolvent laws of Pennsylvania, and in accordance with these laws he executed an assignment of his property on January 11, 1839, and he mentioned this claim against the United States in the statement of his property, which was required by the laws. He received his discharge in the same January. Congress, on May 2, 1840, passed an act "That the Secretary of the Treasury be, and is hereby, authorized to pay to Robert Milnor and John Thompson the sum of two thousand seven hundred and fifty-seven dollars and twenty-three cents, being the amount of
59 fees equitably due to them for extra services," &c. 6 Stats. at Large, 792. Metz, the assignee of Milnor, made no claim before Congress, but after the act he claimed one-half of the amount (it being admitted that Milnor was entitled to one-half); his application was rejected, and thereupon he brought suit against the Secretary of the Treasury, Milnor, and others, and the court held that the money belonged to the assignee. I cannot distinguish the principles which should govern the case at bar from those declared in Comegys *v.* Vasse and the other cases cited.

I think that the claim of the plaintiffs was a claim growing out of and relating to property, and that it has been so treated by Congress in the act of 1882, and that the money appropriated by Congress was appropriated in satisfaction of this claim, and that the money awarded is a part of the estate of the plaintiffs, which passed to the assignees under the assignment in bankruptcy.

Mr. Justice William Allen concurs in this dissent.

59½ [Endorsed:] John Heard *vs.* James Sturgis. Certified copy of the opinion of the supreme judicial court.

60 The following is the original citation and acknowledgment of service thereon.

61 The United States of America to John Heard, of Ipswich, in the county of Essex, and State of Massachusetts; Augustine Heard, of the city, county, and State of New York, and Albert F. Heard, of Boston, in the county of Suffolk, and State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court within and for the county of Suffolk and Commonwealth of Massachusetts, wherein Moses Williams, of Brookline, in the county of Norfolk, and State of Massachusetts, in his capacity as assignee in bankruptcy of said John Heard, Augustine Heard, and Albert F. Heard, is plaintiff in error and you are defendants in error, to show cause, if any there

be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Marcus Morton, chief justice of said supreme judicial court, this eighth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

MARCUS MORTON,
Chief Justice of Sup. Jud. Court.

62 BOSTON, *June 9th*, 1888.

Due and sufficient service of the within citation is hereby acknowledged.

HENRY W. PUTNAM,
Attorney for John Heard, Albert F. Heard, & Augustine Heard, Defendants in Error.

63 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

I, John Noble, clerk of the supreme judicial court within and for said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record in the case of John Heard *et al. vs.* James Sturgis *et al.*

II. The assignment of errors.

III. The application for writ of error.

IV. The opinions of the full court, annexed to and transmitted with the record.

V. And of all the proceedings in said case, with all things concerning the same, together with

VI. The original citation; and

VII. The acknowledgment of service thereon.

In witness whereof I have hereto set my hand and affixed the seal of said supreme judicial court this sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] JOHN NOBLE,
Clerk Sup. Jud. Court.

Endorsed on cover: Massachusetts supreme judicial court. No. 1024. Moses Williams, as assignee in bankruptcy of John Heard, Augustine Heard, and Albert F. Heard, plaintiff in error, *vs.* John Heard, Augustine Heard, and Albert F. Heard. Filed June 21, 1888.

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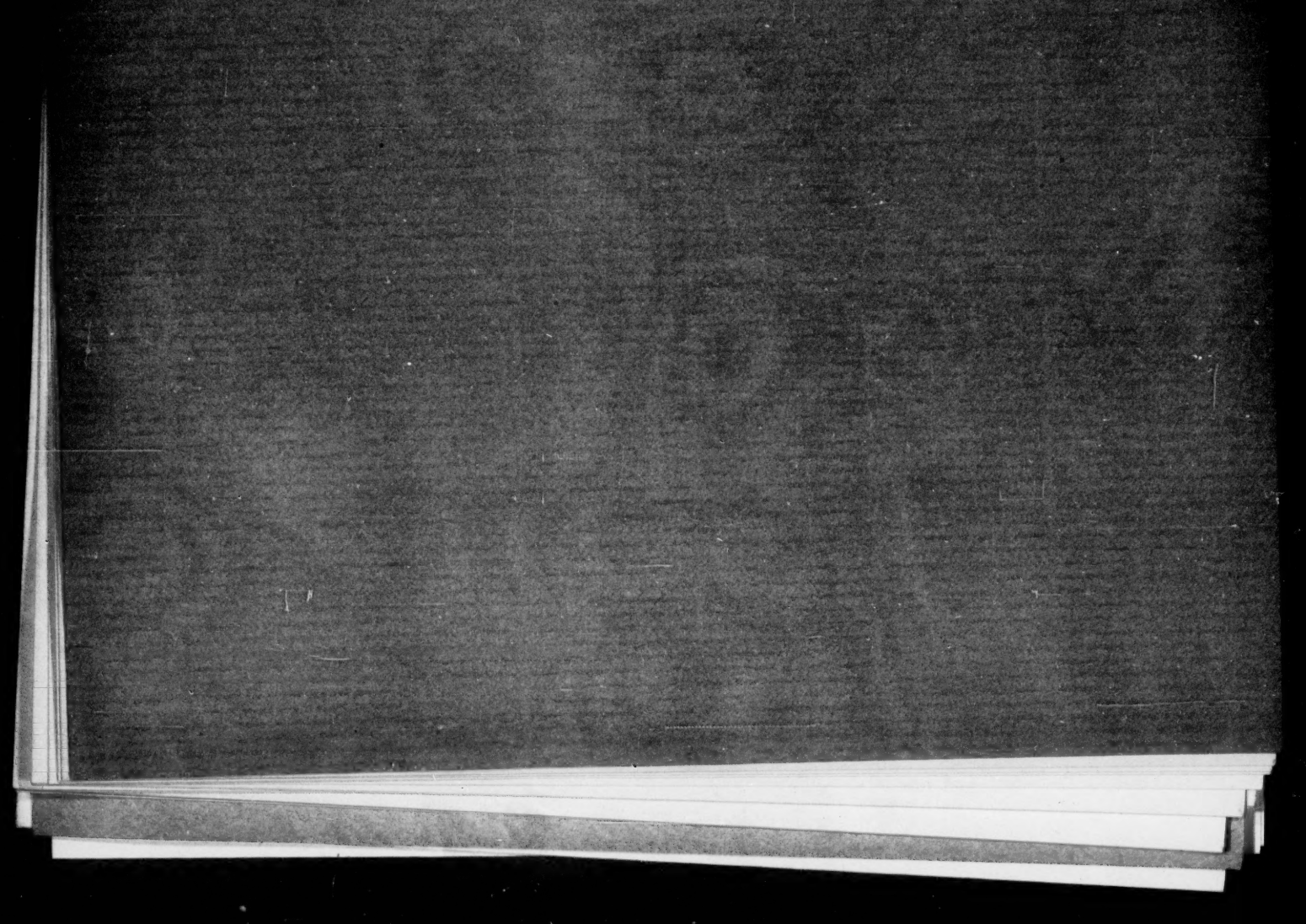
SUPREME COURT OF THE UNITED STATES.

MOSES WILLIAMS, Assignee, Plaintiff in Error,

v.

JOHN HEARD et als.

PLAINTIFF'S BRIEF.



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PLAINTIFF'S BRIEF.

THE JURISDICTION.

The case was submitted to the State court on an agreed statement of facts, and the decision of that court was that money which the assignee in bankruptcy held by virtue of a treaty and a statute of the United States should be taken away from him. The decision was against the right of a party claiming under a treaty and a statute of the United States and under a commission or authority held under the United States, and this court has jurisdiction.

Bachman *v.* Lawson, 109 U. S. 659.
Martin *v.* Hunter, 1 Wheat. 304.
Atherton *v.* Fowler, 91 U. S. 143.
Silver *v.* Ladd, 6 Wall. 440.
State of Minnesota *v.* Batchelder, 1 Wall. 109.

Where a right or immunity is set up under a judgment of a United States court, and decision is against such right, the case is reviewable in the supreme court.

Dupasseur *v.* Rochereau, 21 Wall. 130.

Where both parties claimed title under an act of Congress, and the decision of the State court was upon the construction given to that act by the commissioners acting under its authority, this court has jurisdiction.

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Ross *v.* Barland, 1 Pet. 656.
Matthews *v.* Lane, 4 Cranch, 382.
Lessieur *v.* Price, 12 How. 59, 73.
City of Mobile *v.* Eslava, 16 Pet. 234.

So if a decision was against the validity of title to land derived under confirmation by board of commissioners under an act of Congress.

Berthold *v.* McDonald, 22 How. 334.
Cousin *v.* Blanc, 19 How. 202.

The question under the bankrupt law, being the question whether the money belongs to the assignee or the bankrupt, is a Federal question.

I.

The money in dispute in this case must either have been paid by the United States government because the defendants had a vested right to it and in it, in which case it would pass to the assignee in bankruptcy of the defendants, or else it was a pure gift by the United States.

There does not seem to be room for any other contention, and we are not aware that any other has been at any time made.

We shall therefore consider the case in these two aspects.

THE TREATY OF WASHINGTON.

The Treaty of Washington begins as follows: —

Article I.

"Whereas differences have arisen between the government of the United States and the government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels, which have given rise to the claims generically known as the 'Alabama Claims;'

"And whereas Her Britannic Majesty has authorized her high commissioners and plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's government for the escape, under whatever circumstances, of the Ala-

bama and other vessels from British ports, and for the depredations committed by those vessels;

"Now, in order to remove and adjust *all complaints and claims* on the part of the United States, and to provide for the speedy settlement of such *claims*, which are not admitted by Her Britannic Majesty's government, the high contracting parties agree that *all* the said *claims*, growing out of acts committed by the aforesaid vessels *and generically known as the 'Alabama Claims,'* shall be referred to a tribunal of arbitration, to be composed of five arbitrators to be appointed in the following manner, that is to say: . . ."

Article II.

"The arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine and decide *all questions that shall be laid before them* on the part of the government of the United States and Her Britannic Majesty respectively."

Thus it will be seen that by the Treaty of Washington it was a recognized fact that differences had arisen between the two governments which had given rise to claims generically known as the "Alabama Claims," and that, by the treaty, in order to adjust *all complaints* and *claims* on the part of the United States, a tribunal was constituted to pass upon "*all the said claims* growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama Claims.'"

The *claims* presented to the tribunal at Geneva, in fact, included the claims for enhanced premiums of insurance, or "war risks," as appears by the following extract from the case presented by the United States, viz.: "With the reservations already stated the United States present the amount, so far as it has come to their knowledge, of the enhanced payments of insurance, caused by the acts of the insurgent cruisers. All of these cruisers came from England, and should the tribunal find Great Britain responsible for the injuries caused by their acts, it cannot be denied that the war risk was the result of their despatch from British ports. The amount of this injury so far as yet known to the United

States appears in Vol. III." (Message and Documents of Department of State, Part 2, Vol. I., p. 188, 1872, 1873.)

These claims were then clearly such as were contemplated by the plain language of the treaty.

But it is said that they were not in fact recognized by the tribunal or passed upon as such.

It becomes necessary, therefore, to consider what was, in fact, the history of these "claims" before the tribunal.

History of the so-called War Premiums.

In the first place, immediately upon the ratification of the Treaty of Washington, the Department of State issued a circular letter of instructions in answer to inquiries of claimants, in which it was stated that the department would "present to the tribunal at Geneva all claims, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama Claims', which might be presented in time to enable it to do so", and in response to this circular, claims to the amount of $6,146,219.71 for enhanced premiums for war risks were in fact brought in.

Secondly, it appears that these "claims" for war premiums were in fact presented by the United States to the tribunal.

Opinion of French, J. The Bankruptcy Question in Rules and Opinions of Court of Commissioners, Alabama Claims, Washington, 1885.

Case of the United States, published by authority of the United States, p. 476.

Message and Documents, Department of State, Part 2, Vol. III., p. 187.

Thus it will be seen that these "claims" were insisted upon by their owners and recognized by the United States as claims entitled to be considered by the tribunal, and as claims which had been in existence since the war, but which until the Treaty of Washington could not be enforced because of the familiar doctrine that the sovereign cannot be sued by the subject until such time as the government shall permit.

These "claims" were not then for the first time created but were then for the first time recognized.

In other words, the United States, then for the first time so far threw off the attributes of sovereignty as to recognize these then existing claims by its acceptance of them and by its undertaking to present them to the tribunal.

The next step of the United States was to present these claims, and the record of these claims before the tribunal is as follows: —

When the claims we are discussing and certain other so-called "indirect claims" for national losses, which the United States contended resulted from the acts of the Confederate cruisers (as, for instance, claims for damages resulting from the prolongation of the war) were presented to the tribunal, — and, by the way, the claims we are discussing seem to have suffered very materially by the unfortunate association of them with these other somewhat shadowy demands, — and when these demands of the United States were thus brought prominently and unavoidably to the attention of Great Britain, the authorities of that government professed to believe that none of these claims were within the purview of the Treaty of Washington, and asked the tribunal to adjourn "for such a period as might enable a supplementary convention to be concluded and ratified between the United States and Her Britannic Majesty." (See Protocol III. of the Tribunal, Message and Documents, Department of State, Part 2, Vol. IV., 1872–73)

This was on June 15, 1872, and an adjournment was accordingly had to June 17, 1872, on which date the tribunal met, and the agent for the United States stated "that he was still without definite instructions from his government regarding the request of the British agent for adjournment, and suggested a further adjournment until Wednesday, the 19th instant," which was granted. (See Protocol IV., same document.)

On June 19, 1872, the tribunal again met, and made the statement with regard to the indirect claims set forth in Protocol V., same document.

This statement recited that "the application of the agent of Her Britannic Majesty's government being now before the

arbitrators, the president of the tribunal proposes to make the following communication on the part of the arbitrators to the parties interested: The arbitrators wish it to be understood that in the observations which they are about to make they have in view solely the application of the agent of Her Britannic Majesty's government, which is now before them, for an adjournment, and the motives for that application.

"The arbitrators do not propose to *express* or *imply* any opinion upon the point thus in difference between the two governments as to the interpretation or effect of the treaty; but it seems to them obvious that the substantial object of the adjournment must be to give the two governments an opportunity of determining whether the claims in question shall or shall not be submitted to the decision of the arbitrators, and that any difference between the two governments on this point may make the adjournment unproductive of any useful effect, and, after a delay of many months, during which both nations may be kept in a state of painful suspense, may end in a result which it is to be presumed both governments would equally deplore, that of making this arbitration wholly abortive.

"This being so, the arbitrators think it right to state that after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon."

On June 25, 1872, the tribunal met and the agent of the United States, after reciting the substance of the foregoing statement, said: "The declaration made by the tribunal is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.

"The agent of the United States is authorized to say that consequently the above-mentioned claims will not be further insisted upon before the tribunal by the United States, and may be excluded from all consideration in any award that may be made."

And the agent of Great Britain at a subsequent session having signified his assent to the position assumed by the United States, the president of the tribunal, "on behalf of all the arbitrators, then declared that the several claims for indirect losses are and from henceforth shall be wholly excluded from the consideration of the tribunal," and directed the secretary to embody this declaration in the protocol of this day's proceedings. (See Protocols VI. and VII.)

Thus it will be seen, —

1st. That Great Britain did not ask to have the tribunal decide whether these claims existed and were within the purview of the treaty or not.

2d. That the tribunal did not assume to decide, but expressly and carefully declined to decide this question.

3d. That the United States, upon the declaration of the tribunal that these claims ought not to have been put into the treaty, as an act of diplomacy decided to withdraw them.

The statement of the tribunal, in which they carefully declined to express an opinion upon the question at issue between the two governments, to the effect that these so-called indirect claims ought not to have been included in the treaty, was merely the expression of the tribunal upon a question which not only was not argued, but was not even presented to the tribunal, and was obviously intended not as a formal decision of the question, but merely for the purpose of suggesting to the two governments a way out of the difficulty which had arisen between them, and which bade fair to render the treaty "wholly abortive."

Now, whatever force or effect is to be given to the action of the tribunal, one thing is clear, viz.: that the United States in accepting these claims and in undertaking to present them to the tribunal, and in presenting them in fact, did actually recognize these claims just as fully and effectually as if Congress had passed the most solemn statute pledging the faith of the United States that they should be recognized.

The fact that the agent of the United States afterwards consented to withdraw them from the consideration of the tribunal cannot affect what had already been done by this government any further or otherwise than this: —

The government having undertaken to prosecute the claims, and then having withdrawn them, the duty was cast upon the United States, in case a sufficient sum were recovered, to make good to the claimants the loss which they had sustained by the failure of the government to carry out its own offer to present and prosecute them. The United States, in other words, by its act put itself in a position where it ought to satisfy these claims if it received money from Great Britain applicable to them, and by accepting and undertaking to prosecute the claims, made the government a trustee for the claimants, and it afterwards recognized its duty as trustee by distributing the surplus fund among the war premium claimants.

History will prove that the withdrawal of these claims by the United States was not made because the United States had ceased to believe in the existence or the justice of these claims, but because, with the other large interests at stake, the probability of England's refusal to go on with the arbitration unless these claims were withdrawn and the impossibility of compelling her to do so, except by a recourse to war, the United States was compelled to elect the lesser of two evils and to sacrifice the smaller claims in order to secure the larger.

This she did. But she went no further, and we find no other act on the part of the United States from that time forward indicating any intention on her part of receding from the position that she took in the outset of recognizing the validity of these claims.

The next step in the matter was the Act of 1882, which was but the crowning act on the part of the United States providing for the payment of these claims which she had recognized as valid, and had voluntarily undertaken to collect.

These claims were not withdrawn because of any decision by the tribunal that they were not within the purview and scope of the treaty, for the tribunal carefully stated that

they did not "propose to *express* or *imply* any opinion upon the point thus in difference between the two governments as to the *interpretation* or *effect* of the treaty," and merely indicated their opinion that they ought not to have been included therein (which, by the way, was a pretty significant indication that they had been comprehended in the terms of the treaty).

They were then withdrawn simply as has been indicated, as an act of diplomacy, to prevent the treaty from becoming "wholly abortive."

Does this withdrawal of the claims impair their sanctity as between the government which had undertaken to collect them and the claimants who were the constituents of the government?

The United States, then, had recognized these claims as existing; had undertaken to present them; had failed for reasons of their own in no way influenced by any decision of the arbitrators to press them to a conclusion.

Hon. Hamilton Fish, Secretary of State, in a letter to General Schenk, United States Minister at London, written during the diplomatic discussion which the presentation of the "indirect claims" gave rise to, said: "What are called the indirect losses and claims are not now put forward for the first time. For years they have been prominently and historically part of the 'Alabama Claims.'" He was then speaking officially for the United States. (Message and Documents, Department of State, Part 2, Vol. II., p. 431, 1872, 1873.)

What more honorable thing could the United States do under these circumstances than to provide for their payment as they afterwards did by the Act of 1882?

Could the United States have done less under the circumstances?

And would it redound to the credit of the United States when they have done this simple act of justice to say that it was a gift which they made, and not a mere provision for the payment of those claims which they had of their own motion undertaken as valid and yet failed to collect?

Article XI. of the Treaty of Washington provided as follows: —

Article XI.

"The high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration and of the Board of Assessors, should such board be appointed, as a full, perfect and final settlement of all the claims hereinbefore referred to, and further engage that *every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board*, shall, from and after the conclusion of the proceedings of the tribunal or board, be considered and treated as finally settled, barred and thenceforth inadmissible."

By this provision the claims of those who had paid war premiums were cut off forever, when the United States withdrew them from the tribunal.

And it must follow that the United States by its deliberate withdrawal of these claims made itself trustee for these claimants and took upon itself the payment of them, — a payment which it subsequently made by the Act of 1882.

The defendants in error became bankrupt in 1875, and whether or not their claims for reimbursement of war premiums were legal rights of property at their inception, they certainly became so when the United States first recognized them, which was not later than 1871, and before the bankruptcy of the Heards.

If, then, these war premium claims were, as the history of the case would seem to show, claims created during the war, in existence before and at the time of the Treaty of Washington, the fact that they were for the first time made enforceable by the Act of 1882 would not make them any other than such as would pass by an assignment in bankruptcy.

These claims were just as much claims of right as the claims of the "first class," so called, and like them would pass to an assignee in bankruptcy.

Leonard *v.* Nye, 125 Mass. 469.
Bachman *v.* Lawson, 109 U. S. 659.
Comegys *v.* Vasse, 1 Peters, 193.
Erwin *v.* United States, 97 U. S. 392.
Pierce *v.* Stidworthy, 79 Me. 234.

Kingsbury v. Durrill, 151 Mass 199

Grant *v.* Bodwell, 78 Me. 460.
Phelps *v.* McDonald, 99 U. S. 298.
Milnor *v.* Metz, 16 Pet. 221.
Morgan *v.* Yeats, 5 C. B. (N. S.) 653.

In the two Maine cases above cited the supreme court of Maine applied the doctrine we contend for to losses occasioned by exculpated cruisers. Why should not the rule which is applied in the case of exculpated cruisers apply to war premium claims? The Geneva tribunal rejected the former quite as explicitly as the latter.

If that part of the money which the United States received from Great Britain in the Geneva award which was not required for the payment of the claims of the first class was not applicable to the payment of the claims of the second class, then it should have been returned to Great Britain.

If it ought not to have been returned to Great Britain, it can only be upon the theory that the claimants of the second class were entitled to it as against Great Britain.

It is inconceivable that the government of this country should retain money to which it was not entitled, simply because by an error in computation a larger sum was awarded than was justly due.

Could the agent for the United States standing before the great tribunal at Geneva have then said, "Here are my direct claims; now I want you to give me five million dollars to give away to the owners of the so-called indirect claims"? And yet our adversaries now ask the Supreme Court of the United States to solemnly hold before the nations of the world that the claim made by the agent of the United States as to these war premiums at Geneva was not made to satisfy a legal duty towards the citizens of the Republic, but was made to secure funds to give them presents or gratuities!

II.

But there is another consideration which must not be overlooked which is this: Does that part of the decision in

Comegys *v.* Vasse, which holds that the decision of the commissioners was not final upon the question of the party entitled, have any application to the case at bar?

In other words, was the decision of the court of Alabama Claims final or not?

Does the doctrine of Comegys *v.* Vasse apply to such a tribunal as the Court of Commissioners of Alabama Claims, *when all the parties were before that court?*

Is there not a very obvious distinction to be drawn between the tribunal referred to in Comegys *v.* Vasse and the tribunal whose acts we are discussing?

The former was established by a treaty between the United States and Spain. It was not styled a court. It had none of the attributes of a court. Its duty was expressed to be merely to determine the amount and validity of the claims presented. It could not summon witnesses. It had none of the ordinary means of courts of law for determining any questions of title as between parties and no authority in terms given it so to do.

In the case at bar the Court of Commissioners of Alabama Claims was a very different tribunal from the commissioners who passed upon the case of Comegys. In that case Vasse was not before the board. In the case at bar the bankrupts were parties to the proceedings before the court of Alabama Claims. (Record, p. 6.)

Moreover, the Act of June 5, 1882, re-established the Court of Commissioners of Alabama Claims, which was created by chapter 459 of the Acts of the forty-third Congress, being the Act of June 23, 1874, with the obligations, duties and *powers* imposed and conferred by the Act of 1874, except as changed or modified by the later act.

These acts provided for judges who were to be sworn, a clerk, a reporter and counsel for the United States. The marshal of the United States for the District of Columbia was to serve all process of the court and to execute the process thereof.

By section 4 of the Act of 1882 the court was to receive and examine the claims and to enter judgment thereon. All through the Act of 1882 the tribunal is spoken of as a court.

By the Act of 1874, section 1, five persons were to be appointed "who shall constitute a court," and vacancies were to be filled "in the same manner as vacancies occurring in offices under the Constitution of the United States are filled."

By section 3 the court was to make rules for procedure, which "rules and mode of procedure shall conform, as far as practicable, to the mode of procedure and practice of the circuit court of the United States"; "*and said court is hereby vested with the same powers now possessed by the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants and witnesses,* to preserve order *and to punish for contempts.*"

"*And said court shall have power to compel the production of any books or papers deemed material to the consideration of any claim or matter pending therein.*"

Section 10 declares that any person falsely swearing before said court should be deemed guilty of perjury "the same as if such false oath or affirmation had been taken in a judicial proceeding in any of the courts of the United States."

It is impossible to imagine what other form of words could have been used by Congress if they intended to create a tribunal to pass upon the conflicting claims of claimants. And while it may be admitted that the decision of that court, made as in the case of Leonard *v.* Nye, where the assignee was not a party, would not be conclusive upon the assignee, may it not fairly be contended that where the adjudication was made with all the parties before the court the decision is final?

The Gift Theory Considered.

If it is held that the person who paid enhanced rates of insurance did not thereby acquire any right to reimbursement, any right *ad rem* and *in re*, then it must follow that the distribution of the money provided for by Act of 1882 among the claimants of the so-called second class was an act of pure gift, and it becomes necessary to consider the case in this aspect, although it must be observed in passing that it is somewhat anomalous and unusual to find a government in one and the same statute and by one and the same instru-

ment and means dispensing money to claimants of right, and by the same procedure giving away gratuitously from the same fund to objects of its bounty.

In Comegys *v.* Vasse, 1 Peters, 193, this court first laid down the rule that where money was to be distributed under a treaty by commissioners, among persons entitled as of right to receive the same, the duty of the commissioners was confined to determining the amount due in each particular case, leaving the conflicting rights of individual claimants to the amounts so ascertained to be determined by the ordinary courts of law, and it held that the jurisdiction to determine between these conflicting rights was not conferred upon the commissioners.

The court gave the reasons for this view of the law, which may be learned by the following citations from the opinion of Mr. Justice Story in that case: —

He says, at page 212 of the report: "It has been justly remarked, in the opinion of the learned judge who decided this case in the circuit court, that it does not appear from the statement of facts who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made.

"We do not think that the fact is material upon the view which we take of the authority and duties of the commissioners.

"The object of the treaty was to invest the commissioners with full power and authority to receive, examine and decide upon the *amount* and *validity* of the asserted claims upon Spain for damages and injuries.

"Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction.

"A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the *treaty*.

"But it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting *rights* of different citizens to the fund so awarded.

"The commissioners are to look to *the original claim* for damages and injuries against Spain itself, and it is wholly immaterial for this purpose upon whom it may, in the intermediate time, have devolved; or who was the *original legal*, as contra-distinguished from the *equitable*, *owner*, provided he was an American citizen.

"If the *claim* was to be allowed as against Spain, the *present ownership* of it, whether in assignees or personal representatives, or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner.

"Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties asserting conflicting interests to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and, under such circumstances, it cannot be presumed that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of substantial justice.

"The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts where redress could be administered according to the nature and extent or the *rights* or *equities* of all the parties.

"We are therefore of opinion that the award of the commissioners, in whatever form made, presents no bar to the action if the plaintiff is entitled to the money awarded by the commissioners."

In order to a just understanding of this decision it becomes necessary briefly to set forth the facts of the case, which were as follows: —

"Previous to 1802 Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United

States, which were captured and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse by the owners, and he paid the losses arising therefrom prior to 1802.

"Vasse became bankrupt and an assignment in bankruptcy was made of his estate to Comegys *et al.* Vasse received his discharge in 1802. In 1824, the sum of $8,846.14 was received by Comegys *et al.*, assignees, from the Treasurer of the United States, being the sum awarded by the commissioners sitting at Washington, under the treaty with Spain, dated Feb. 22, 1819, which ceded Florida to the United States, on account of the captures and losses aforesaid. Vasse brought an action of assumpsit against said Comegys *et al.* to recover this money."

Now, it will be noticed in the first place that the commissioners were appointed and their determination made not as in the case at bar, under a statute of the United States, but under a treaty with Spain. And secondly, that by the terms of the treaty the duties of the commissioners were merely to "*receive, examine and decide upon the amount and validity of all claims* included within the descriptions above mentioned," *i.e.*, the claims mentioned in the treaty.

It will thus be seen that in deciding what were the limits of the jurisdiction of the commissioners this court laid great stress upon this language of the treaty, and the court held that, under this carefully restricted statement of the functions of the commissioners, they could not be deemed to have any general judicial powers or jurisdiction. It was not the province of the treaty, to provide for the erection of a court in one of the contracting countries. It was the province of the treaty to provide for a commission to determine how much should be paid under the treaty. In the case at bar the treaty itself determined the gross amount to be paid, and it was left for the United States government to provide a court to do what? To determine who were the parties entitled. That court with all these parties before it decided in favor of the plaintiff in error; the defendants in error have had their day in court and there is no appeal.

A comparison of the words of this treaty with the language of the statute of 1882, in terms providing for a court

with all the attributes of an ordinary judicial tribunal, will show that the decision in Comegys *v.* Vasse that the commissioners had no power to decide between the conflicting rights of different claimants to the same fund can have no application to a tribunal constituted by the Act of 1882. Moreover, the fact that it did not appear in Comegys *v.* Vasse that Vasse was before the commissioners prevents the application of that case to the case at bar, since here it appears from the record that the bankrupts were before the tribunal acting under the Act of 1882, and have had their day in a court erected for the express purpose of determining the question at issue in this case and are bound by the judgment of that court. The opinion of the Court of Appeals of New York, in Taft *v.* Marsily, 120 N. Y. 474, begins with the statement that in that case the bankrupt was not before the Court of Commissioners of Alabama Claims.

III.

But if it is the opinion of this court that, in respect to the point we have been discussing, the analogy between the two cases is such as to make the decision in Comegys *v.* Vasse decisive of the limits of the jurisdiction of the Court of Commissioners of Alabama Claims, provided in other respects the conditions are the same, we must refer to a very important distinction between the two cases which shows at once that the former case is no authority upon the question of jurisdiction.

The whole course of the reasoning of the court which led it to adopt the view that the decision of the commissioners was not final upon the question of the party entitled proceeds and is entirely based upon the theory that the claims of which the commissioners were ascertaining merely the "amount and validity" were claims of right, legally or equitably belonging to various parties, and antedating in their inception the passage of the treaty which provided for their payment.

Everywhere in the opinion you find language used which recognizes this status of the claims. Moreover, the logical conclusion to which the court came in that case requires

that the claims which they were discussing should have been claims of right antedating the treaty.

What becomes of this reasoning if instead of such claims antedating the treaty you substitute gifts *created* by the statute under which the Alabama court sat?

If there were in fact no claims which were of such a nature as to constitute rights of property antedating the treaty, to pay which the treaty was passed, but instead thereof merely gifts created by the same statute which provided for their distribution, how could there be any ordinary judicial tribunal to determine who should be the recipient of the bounty of the United States except that tribunal which the donor provided?

If the United States determined to give away a large sum of money, and provided a court or a commission or any other instrument to make the distribution, how can the ordinary judicial tribunals, especially those of the different States, determine whether that instrument has upon the whole done its duty well?

Is not Congress capable of declaring how the bounty of the United States shall be dispensed, or must its views be overruled by the ordinary judicial tribunals?

Upon the theory of gift there can be but one conclusion; that is, that the decision of the officers appointed by Congress to dispense its bounty is final, and it can make no difference what name you give to those officers. The gift takes effect upon its delivery and not before.

Once delivered it is gone from him that gave, and becomes the property of him to whom it is given. And if we assume that the ordinary judicial tribunal of the State may entertain the suit of some disappointed suitor claiming that he should have been the recipient of the gift, upon what principles of law will that tribunal decide? What right has the Massachusetts court to take the gift from A. and give it to B.?

Moore *v.* Moore, 127 Mass. 22.

If the distribution was a gift, then Congress might, if it had seen fit, have indicated by its statute the precise persons who were to receive it. If this course had been taken and the statute had said in terms that the assignees in bank-

ruptcy of the Heards should receive this sum of money, could any court, State or national, have taken the money from the assignees and have given it to the bankrupts on the ground that Congress had not done wisely in giving it to the assignee?

And if instead of this, Congress had said that the money shall be paid to those persons who shall be designated by certain commissioners appointed by it, can any court afterwards alter this disposition?

The case may be summed up as follows: —

1st. If the defendants in error had a valid claim against Great Britain which antedated the treaty, the case of Comegys *v.* Vasse applies, and the claim passed by the assignment to the plaintiff in error, their assignee.

2d. If the defendants in error did not have a valid claim against Great Britain which antedated the treaty, still the Court of Commissioners of Alabama Claims decided against them, in a proceeding to which they were parties. That decision was a decision of a *court* erected by Congress for the express purpose of deciding this question, and there is no provision of law which authorizes any other court to overrule that court's decision.

3d. If the money was a gift, then there is no provision of law whereby the ordinary judicial tribunals can review the decisions of the tribunal erected by Congress for the express purpose of making the distribution.

M. & C. A. WILLIAMS,

Counsel for Plaintiff in error.

SUPREME COURT OF THE UNITED STATES

MOSES WILLIAMS, Appellee,

vs.

JOHN HEARD ET AL.,

Appellants.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR DEFENDANTS IN ERROR

HENRY W. PUTNAM,
Of Counsel for Defendants in Error.

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Supreme Court of the United States.

MOSES WILLIAMS, *Assignee, Plaintiff in Error,*
v.
JOHN HEARD ET AL., *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This is an action of money had and received, brought and heard upon agreed facts (Rec., pages 5, 6) in the Supreme Judicial Court of Massachusetts, by certain bankrupts against their assignee in bankruptcy to recover moneys received by the latter from the United States. The decision of that court was against said assignee, and he has sued out this writ of error to the State court.

The defendants in error paid in 1861–5 certain war-premiums, or enhanced premiums for insurance on war-risks, occasioned by the presence upon the ocean of Confederate cruisers preying upon American commerce, and "during that period bore true allegiance to the government of the United States." (Rec., page 5.) These cruisers were the "Alabama" and a tender; the "Florida" and three tenders; the "Shenandoah"; the "Retribution"; the "Georgia"; the "Sumter"; the "Nashville"; the Tallahassee"; the "Chickamauga"; the "Sallie"; the "Jefferson Davis"; the "Music"; the "Boston"; and the "V. H. Joy," — fourteen in all, not including the tenders. (See Geneva Award,

Cushing's "Treaty of Washington," pages 277–279) and many "Inshore Cruisers" (Hackett's Geneva Award Acts, pages 100–2). The question in the case, on the merits, is whether an award on account of these war-premiums, under the Act of Congress of 1882, which provided for their payment out of the unexpended balance of the Geneva Award, belongs to the person who originally paid the premiums, or to his assignee in bankruptcy under an assignment made in 1875.

The Treaty of Washington was entered into on July 4, 1871, and contained the following provisions, among others: —

THE TREATY OF WASHINGTON.

ARTICLE I.

Whereas differences have arisen between the government of the United States and the government of her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "Alabama claims"; and whereas Her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the "Alabama" and other vessels from British ports, and for the depredations committed by those vessels: —

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by Her Britannic Majesty's government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the "Alabama claims," shall be referred to a Tribunal of Arbitration. . . .

ARTICLE VI.

In deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case.

RULES.

A neutral government is bound, —

First. To use *due diligence* to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use *like diligence* to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been especially adapted, in whole or in part, within such jurisdiction, to warlike use.

Second. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Third. To exercise *due diligence* in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. . . .

See Cushing's "Treaty of Washington," pages 258, 260.

Article XI.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration and of the Board of Assessors, should such Board be appointed, as *a full, perfect and final settlement of all the claims hereinbefore referred to;* and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board, shall, from and after the conclusion of the proceedings of the tribunal or board, be considered and treated as finally settled, barred, and thenceforth inadmissible.

Before the Tribunal of Arbitration, at Geneva, the following proceedings were had upon the subject of indirect claims: —

The Geneva Tribunal's Proceedings.

In Protocol V., being the record of the proceedings of the Tribunal of Arbitration, at the fifth conference, held at Geneva, in Switzerland, on the 19th of June, 1872, Count Sclopis, on behalf of all the arbitrators, made the following statement . . . "The arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the government of the United States, in respect of these claims, *they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations*, and should upon such principles be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagree-

ment between the two governments as to the competency of the tribunal to decide thereon.

Messages and Documents, Department of State. Part 2, Vol. 4, 1872–3, p. 20.

In Protocol VI., dated June 25, 1872, the agent of the United States stated that "the declaration made by the tribunal, individually and collectively, respecting the claims presented by the United States for the award of the tribunal for, *First*, the losses in the transfer of the American Commercial Marine to the British flag; *Second*, *the enhanced payments of insurance;* and, *Third*, the prolongation of the war and the addition of a large sum to the cost of the war and the supressing of the rebellion," *is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.*

The agent of the United States is authorized to say that, "consequently, the above-mentioned claims will not be further insisted upon before the tribunal by the United States, and *may be excluded from all consideration in any award that may be made.*

Same, p. 21.

Protocol VII., June 27, 1872, Count Sclopis, on behalf of all the arbitrators, then declared that the said several claims for indirect losses mentioned in the statement made by the agent of the United States on the 25th instant, and referred to in the statement just made by the agent of Her Britannic Majesty are, and from henceforth shall be, wholly excluded from the consideration of the tribunal, and directed the Secretary to embody this declaration in the protocol of this day's proceedings.

Same, p. 22.

On Sept. 14, 1872, the Tribunal of Arbitration rendered its final decision that Great Britain had, in the case of the "Alabama" and her tender, failed, by omission, to fulfil the duties prescribed in the first and the third of the said rules; that in the case of the "Florida" and her tender she failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules; and in the case of the "Shenandoah," that she had failed, by omission, to fulfil the duties prescribed by the second and third of the said rules after the "Shenandoah" departed from Melbourne, on Feb. 18, 1865, *and that so far as related to any other vessel she had not failed by act or omission to fulfil any of the duties prescribed by the said rules.* The tribunal accordingly awarded $15,500,000 as indemnity. (See Cushing's "Treaty of Washington," pp. 277 *et seq.*)

The Acts of Congress of 1874 and 1882.

On June 23, 1874, Congress passed an act (Ch. 459 of the 43d Congress, 18 Stat. 245), entitled "An act for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award made by the Tribunal of Arbitration constituted by virtue of the first article of the treaty concluded at Washington, etc.," which provides in Section 11, that said court shall "receive and examine all claims admissible under this act that may be presented to it, directly resulting from damage caused by the so-called insurgent cruisers 'Alabama,' 'Florida,' and their tenders, and . . . by the so-called insurgent cruiser 'Shenandoah,' after her departure from Melbourne, on the eighteenth day of February, eighteen hundred and sixty-five." This court was, by Section 8, to exist for one year from the date of its first convening and organizing, and the President

might, by proclamation, extend its existence for six months more. By subsequent acts, approved Dec. 24, 1875, March, 6, 1876, and July 22, 1876, the existence of the said Court was continued till Jan. 1, 1877, to enable it to complete its work.

The plaintiffs were adjudicated bankrupts Aug. 5, 1875, were discharged July 20, 1877, and no steps were taken to present their claim until after the passage of the Act of 1882.

On June 5, 1882, Congress passed an act entitled, "An act re-establishing the Court of Commissioners of Alabama Claims, and for the distribution of the unappropriated moneys of the Geneva Award." 22 Stat. 98. It was made the duty of the Court (Section 4) "to receive and examine the claims mentioned in Section 5 of this act, and to enter judgments for the amount allowed therefor in two classes." Section 5 provides that the first class shall be "for claims directly resulting from damage done on the high seas by confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore"; and the second class shall be "*for claims for the payment of premiums for war risks, whether paid to corporations, agents or individuals after the sailing of any confederate cruiser*," and Section 6 provides for the deduction of "any sum received by any claimant as an indemnity, dividend, set-off, or otherwise, so that *the actual loss of such claimant* only shall be allowed."

In December, 1886, said Court of Commissioners made an award to the plaintiff in error's predecessor as assignee (Rec., pp. 5, 6), and on March 19, 1887, this suit was brought against him by the defendant's in error. (Rec , p. 3.)

THE QUESTION OF JURISDICTON.

The single question on the merits passed upon by the State court and presented by the assignments of error, is simply this: "Was the defendants in error's contingent possibility in regard to the war-premiums, property or estate which passed as assets to our assignee in bankruptcy, on Aug. 5, 1875?"

This is not a federal question within the meaning of United States Rev. Stats., Sect. 709, but one of general law and of the policy of the law as to what interests or expectancies will, and what will not, pass as, — in the eye of the law, — property under a general assignment by operation of law for the benefit of creditors under insolvency and bankruptcy laws. Such questions of general law decided by a State court do not give this court jurisdiction, (See Bethel *v.* Demaret, 10 Wall. 537; Delmas *v.* Ins. Co., 14 Id. 666; Steines *v.* Franklin Co., 14 Id. 15; Tarver *v.* Keach, 15 Id. 67; Ins. Co. *v.* Hendreu, 92 U. S. 287; Rockhold *v.* Rockhold, 92 U. S. 130; U. S. *v.* Thompson, 93 U. S. 586; Wolf *v.* Stix, 96 U. S. 541; Old Dominion Bank *v.* McVeigh, 98 Id. 332; Lange *v.* Benedict, 99 U. S. 71; Allen *v.* McVeigh, 107 U. S. 433; Crane *v.* Mut. Ass. Co., 112 U. S. 272, 275; Railroad Co. *v.* Rock, 4 Wall. 177, 181; Chouteau *v.* Gibson, 111 U. S; Boatmen's Bank *v.* State Savings Ass'n, 114 U. S. 265, 268–269; San Francisco *v.* Itsell, 133 U. S. 65, 67; Manning *v.* French, 133 U. S. 186); even though plaintiff in error's general title in the subject matter is under an act of Congress. Kennedy *v.* Hunt, 7 How. 586, 594.

The only clause of Revised Stats., Sect. 709, under which jurisdiction can even colorably be claimed, is the third:

"Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority."

If there is in this case any such right, claimed by either party, as is contemplated by Sect. 709, it is a right under the Act of 1882. That right was set up and claimed by *us* under that Act, which clearly created it in us, and in us only, as the "claimants" who had made "the payment of premiums for war risks," and had sustained "actual loss" (Sects. 5 and 6); and the decision of the State court was in our favor. Our assignee in bankruptcy can claim only by, through and under us, and can take only what was ours in August, 1875. He, therefore, does not claim under the Act of 1882 in the sense contemplated by Sect. 709.

The decision of the State court being in favor of us, who claim under an Act of Congress, this court has no jurisdiction where the other party merely opposes such right, even though he relies upon proceedings under another Act of Congress, — the bankrupt Act, — to show that our right would operate a fraud in law, to wit, upon creditors.

Fulton *v.* McAffee, 16 Pet. 149.
Burke *v.* Gaines, 19 How. 388.
See Missouri *v.* Andriano, 138 U. S. 496, 500–1, and cases cited.

But even if we assume that the assignee can, in any view, be said at all to claim this money directly from the government, instead of only through and under us, he does not bring himself within Sect. 709. His supposed direct claim

to it is not "under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States," within the meaning of Sect. 709.

1. The assignee's right or title to this money is evidently not claimed under the Constitution.

2. It does not arise under a treaty.

It has already been held by this court that the right to war-premiums was not created by the treaty of Washington within the meaning of jurisdictional statutes.

United States *v.* Weld, 127 U. S. 51.

In this respect the war-premiums are clearly distinguishable from the so-called direct claims which did grow out of the treaty.

Great Western Ins. Co. *v.* U. S. 112 U. S. 193.

Where claims against a foreign government are paid under a treaty and award, and where a party and his assignee in insolvency both claim under the award, the issue between the party and his assignee raises no question either as to the validity or construction of the treaty or award, and presents no federal question.

Gill *v.* Oliver, 11 How. 529, 545, 548.
Williams *v.* Oliver, 12 How. 111, 125.
See also Romie *v.* Casanova, 91 U. S. 379.

In Burthe *v.* Dennis, 133 U. S. 514, the plaintiff in error, a citizen of France, alone came within the purview of the treaty, the defendants in error, citizens of the United States, claiming not under, but in spite of, the treaty. The decision of the State court against the plaintiff in error therefore presented a federal question, and the case is clearly distin-

guishable from ours, where neither party claims under the treaty.

3. It does not arise under a statute.

There is no pretence that the Act of 1882 grants this money to creditors or assignees in bankruptcy. The original sufferers are alone mentioned in the Act or contemplated by it. The assignee can be said to claim under the Act, if at all, only derivatively through us, at second hand, and in a remote and indirect sense which this court has expressly rejected in construing similar statutes conferring jurisdiction.

See U. S. *v.* Weld, 127 U. S. 57.

Even the rights of the direct claimants themselves have been held not to have grown out of the Act of 1874 within the meaning of jurisdictional statutes.

Great Western Ins. Co. *v.* U. S., 112 U. S. 199.

The war-premium claims are, indeed, in the sense of the legal rights, created solely and originally by the Act of 1882; but they are created not in the assignee, but in us. The only way in which the assignee can claim them, even through and under us, is by the fiction that the Act of 1882 "relates back" to our bankruptcy in 1875, a question which we discuss in connection with the merits of the case (*post*, pp. 31–2, 43–4). That question of "relating back" is, however, in no sense a federal question nor even a question of the construction of a statute, — for there is no pretence that the statute in terms "relates back," or that its language is retrospective, — but solely one of general equitable doctrine.

The doctrine, long since established in this court, that, where both parties claim under the same treaty, the question between bankrupt and assignee is not a federal question,

is at least equally applicable where both parties claim under the same statute.

Barbarie *v.* Eslava, 9 How. 429, 446, 448.
Gill *v.* Oliver, *ubi supra*.
Williams *v.* Oliver, *ubi supra*.

Even if we take the most favorable view for the plaintiff in error, and assume that the assignee, as well as ourselves, claims under the Act of 1882 within the meaning of jurisdictional statutes, the fact that both claim under the same statute does not give jurisdiction.

Moreland *v.* Page, 20 How. 522.
Romie *v.* Casanova, 91 U. S. 379.
McStay *v.* Friedman, 92 U. S. 723.
California *v.* Jackson, 112 U. S. 233.
Mace *v.* Merrill, 119 U. S. 581, 584.
Downes *v.* Scott, 4 How. 500, 502.
Shaffer *v.* Scudday, 19 How. 16.
Phillips *v.* Mound City Ass'n, 124 U. S. 602.

The fact that in our case the statute is a grant instead of a confirmation (as in Barbarie *v.* Eslava, *ubi supra*) does not affect the principle, the plaintiff in error not being mentioned or indicated as grantee, while the defendants in error are distinctly so described.

The cases which hold that there may be a federal question even where both parties claim under the same statute (see Mathews *v.* Lane, 4 Cranch, 382; Ross *v.* Barland, 1 Pet. 655; Carondelet *v.* St. Louis, 1 Black, 179; Buel *v.* Van Ness, 8 Wheat. 392) do not conflict with our position. They are all cases where each party to the suit claims independently of, and adversely to, the other under one or more federal statutes, and where the interpretation of the said

statutes is necessary to determine which party takes under it. Moreover they arise under Stat. 25 of the judiciary act of 1789, which differed from Rev. Stat., Sect. 709, by including cases where is drawn in question merely the construction of any clause of a statute.

Our case, however, does not turn on any question of construction of the act of 1882. It cannot by any effort be construed to grant money to the assignees in bankruptcy or to creditors, or to anybody but the original sufferers. The decisions in this class of cases (Comegys *v.* Vasse, Leonard *v.* Nye, and other similar cnes) "do not go on the language of the statutes which were under discussion, but upon the nature of the claims forming what we have called the moral consideration for the respective acts. There is nothing decisive in the language of the acts before us, but the circumstances and the words used are at least as favorable to the view that this payment of war-premiums was by way of gratuity as to any other."

Holmes J., in Heard *v.* Sturgis, 146 Mass. 545, 551.

In Bachman *v.* Lawson, 109 U. S. 695, the question of jurisdiction does not appear to have been raised, the court assuming rather than deciding that a federal question was involved. "It would contradict the experience of all who are familiar with courts to assume that every time a court acts under a statute, the validity of the statute or the jurisdiction of the court receives its consideration. This is rarely so, unless the question is raised by one of the parties, and called to the attention of the Court."

Mr. Justice Miller, in The Victory, 6 Wall. 382, 385.

But the case is clearly distinguishable from ours. In that case Bachman asserted a right under and by virtue of the

treaty and the statute of 1874 to the whole award made to him; Lawson claimed for himself twenty-five per cent of the award under a special contract made with him by Bachman just before the treaty to pay him that percentage on the "claim." The question was, whether the claim established by the treaty and award was, for the purpose of construing the contract, to be taken as identical with the one that existed before the treaty, so that the contract should apply to it. Bachman claimed that it was not, and that the treaty and statute of 1874 created a new claim in him, to which the contract did not apply, and that Sect. 18 conferred on him a special immunity from liability on the contract. The State court decided against Bachman, *i. e.*, that as to one quarter of the sum awarded he could not hold it against Lawson. It evidently decided against a right of immunity claimed by Bachman under the treaty, and also under the statute of 1874, — just as we claim under the act of 1882 and could clearly have maintained a writ of error here if the State court had decided against us. Lawson claimed *under Bachman* by virtue of his special contract, not under a treaty or statute, and could not have maintained a writ of error if the decision of the State court had been against him. So the assignee claiming *under us* cannot maintain one. Upon the merits, this court then proceeded to hold that the special contract did apply to the money awarded, and Bachman was held to pay Lawson the twenty-five per cent out of it.

In Emerson *v.* Hall, 13 Pet. 409, the question of jurisdiction does not appear to have been raised; but there evidently was a federal question, because the act of Congress granted the money direct to the heirs of Emerson by name, and the State court decided against them.

4. The award of the Court of Alabama Commissioners to the assignee is not "a commission held or authority exer-

cised under the United States," within the meaning of either the first or third clause of Sect. 709. To come within the statute, such an authority must be a governmental power competent to create the right or title in question.

Millinger *v.* Hartupee, 6 Wall. 258, 261–2.

"Something more than the bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence derived from a competent governmental power . . . In respect to the question we are now considering 'authority' stands upon the same footing with 'treaty' or 'statute'."

Chief Justice Chase in Millinger *v.* Hartupee, 5 Wall. 258, 261–2.

In our case the award of the commissioners gave the assignee only a bare *prima facie* right to receive the money, no valid legal right to it. The commissioners were not a judicial tribunal.

Act of 1874, Sect. 11, and Act of 1882, Sect. 4.
Comegys *v.* Vasse, 1 Peters, 193, 212, 3.
Frevall *v.* Bache, 14 Pet. 92.
Great Western Ins. Co. *v.* United States, 112 U. S. 99, 200.
Leonard *v.* Nye, 125 Mass. 455, 458.
Ahrens *v.* Brooks, 68 Md.
Taft *v.* Marsily, 47 Hun. 175, 120, N. Y. 474.
Kingsbury *v.* Maltocks, 81 Maine, 210.

In Millinger *v.* Hartupee, *ubi supra*, the alleged "authority" was the order of a United States District Court, in a prize case, releasing certain captured cotton to Millinger.

A State court decided, on a garnishee process, that it was the property of one Gearing, and Millinger claimed upon writ of error in this court that that was a decision against a title in him, "under an authority exercised under the United States." But this court held that the district court, although apparently exercising or asserting such an authority, did not in fact possess the power, and dismissed the writ of error.

In our case the award of the Court of Alabama Commissioners simply released the government's right in this war-premium money just as the order of the district court in Millinger *v.* Hartupee released the government's right in the cotton, not affecting in either case the title as between different private claimants, nor conferring any title upon either; giving the assignee a bare *prime facie* right to receive the money, but leaving the question of title to the judicial courts. It certainly was not *more* "authoritative" than the order of a United States District Court in a prize case.

The action of the Alabama commissioners in conferring the valuable right and privilege of practising before them as an attorney was much more within the letter and spirit of this part of Sect. 709 than is their mere *prima facie* designation of an assignee in bankruptcy as the person to receive in the first instance an award. Yet a decision of a State court against the right of such an attorney to recover damages for the alleged unjustifiable deprivation of such right and privilege was held not to present a federal question.

Manning *v.* French, 133 U. S. 186.

Where conflicting grants are made by commissioners to settle land-titles (Garland *v.* Wynn, 20 How. 6; Berthold *v.* McDonald, 22 How. 334), the decision of a State court against either grantee is, of course, reviewable here.

5. The fact that the plaintiff in error claims as assignee

under the general assignment clause of the Bankrupt Act (Rev. Stats., Sects. 5044, 5046), does not bring the case within Sect. 709.

Scott *v.* Kelley, 22 Wall. 57, 59.

The legal question is the same as it would be if the plaintiff in error claimed under a State insolvent law.

The mere question of the bankrupt's title, or estate, is not a federal question.

Scott *v.* Kelley, 22 Wall. 57, 59.
McKenna *v.* Simpson, 129 U. S. 506.
Boatmen's Bank *v.* State Savings Association, 114 U. S. 265, 268–9.

The State court simply held that *we* did not legally have property in the subject matter in 1875. In cannot be seriously contended that this court has jurisdiction to review every decision of a State court against an assignee in bankruptcy on the common-law question whether the subject matter was or was not, in the eye of the law, property.

In Scott *v.* Kelley, *ubi supra*, the question was whether, at the time of Shawhan's bankruptcy, Oct. 28, 1867, the proceeds of certain flour, fraudulently obtained from one Stanard, and sold, belonged to Shawhan, so as to pass to his assignee, Scott, or to Shawhan, Palmer & Mendall, copartners, so as to pass to their attaching creditor, under an attachment dated March 28, 1868. The State court decided that at the date of the assignment in bankruptcy the attaching creditor was entitled in equity to the money, and that the assignee, therefore, acquired no right or title to it; *i. e.*, they denied the right of the assignee, on the ground that the bankrupt had no valid legal title at the date of his assignment. This court held that the assignee could not maintain

a writ of error to review the decision of the State court under Sect. 709.

The cases of a State court deciding against the validity of a discharge in bankruptcy as a bar to an action for a debt (see dicta in Strader *v.* Baldwin, 9 How. 261; Linton *v.* Stanton, 12 How. 423; Calcote *v.* Stanton, 18 How. 243), or against the effect of an order of a District court, staying a judgment of a State court until the question of a bankrupt's discharge could be settled (Hill *v.* Harding, 107 U. S. 131), or of directing the sale of property of the bankrupt and the payment of the proceeds into court (O'Brien *v.* Weld, 92 U. S. 81), are evident denials of an immunity especially set up under the Bankrupt Act, and are clearly distinguished from the case at bar.

The assignee did not make the claim of immunity from proceedings against him in the State court under Rev. St., Sect. 711, until after judgment (Rec. pp. 8, 11). No such claim of immunity was therefore presented to the State court, or decided by it against him, so as to give this court jurisdiction. Winchester *v.* Heiskell, 119 U. S. 450. (See also Santa Cruz Supervisors *v.* Railway Co. 111 U. S. 361.) So that, even if this court gets jurisdiction of the merits, it does not thereby get jurisdiction of this question; or, if it obtains jurisdiction of this question, it does not thereby obtain jurisdiction of the merits.

Murdock *v.* Memphis, 20 Wall. 590.

The Jurisdiction of the State Court.

The tenth assignment (Rec. p. 11) disputes the jurisdiction of the State court to entertain an action for money had and received brought by a bankrupt against his assignee, and contends that the district courts of the United States have sole original jurisdiction of such suits.

Assuming that this court gets jurisdiction of this question, if this contention were well founded the plaintiff in error could have pleaded in abatement or have removed the action from the State court to the United States Court. He cannot raise the question now, and in this proceeding. An assignee in bankruptcy cannot here dispute the jurisdiction of a State court after submitting to it.

Scott *v.* Kelley, 22 Wall. 57.
Mays *v.* Fritton, 20 Wall. 414.
Claflin *v.* Houseman, 93 U. S. 130.
Winchester *v.* Heiskell, 119 U. S. 450, 453, and cases cited.

But the original jurisdiction of the Federal Courts in regard to suits by and against assignees does not exclude that of State courts. It is concurrent with the latter.

Lathrop *v.* Drake, 91 U. S. 516, 518.
Eyster *v.* Gaff, 91 U. S. 521.
Claflin *v.* Houseman, 93 U. S. 130.
Burbank *v.* Bigelow, 92 U. S. 180, 182.
Goodrich *v.* Wilson, 119 Mass. 429, 434.

U. S. Rev. Stat. 563, par. 18, constituting the district courts of bankruptcy, and conferring upon them "original jurisdiction in all matters and proceedings in bankruptcy," does not prevent assignees being sued, either at common law, or in equity, in any courts of general jurisdiction — whether State, or Federal Circuit, Courts — having jurisdiction over their persons. It is universal, every-day, and, so far as we know, wholly undisputed, practice to bring and maintain such suits. (See Berford *v.* Barnes, 45 Hun. [52 N. Y. Sup. Ct.] 253, 255.) The exclusive original jurisdiction of the United States District Courts in bankruptcy (Rev.

Stat. Sects. 4973–75) relates solely to the administration of the assets for the benefit of the creditors in accordance with the Bankrupt law, and does not prevent such suits.

Burbank *v.* Bigelow, 92 U. S. 180, 182.

THE QUESTION ON THE MERITS.

The Defendants in Error had no Right Assignable in Bankruptcy in 1875.

If the court finds that it has jurisdiction of the case, the single question raised by all of the remaining ten assignments of error, though presented in various aspects and stated in different ways, is simply this: Did the defendants in error have, in regard to this so-called "claim" for war premiums at the date of their adjudication in bankruptcy (August 5, 1875), any estate or property assignable in bankruptcy under the bankrupt Act of 1867 (U. S. Rev. Stats., Sect. 5044), then in force? (The assignment was on September 11, 1875, but by express provision of statute it "relates back" to the date of the adjudication. Rev. Stats., Sect. 5044.)

Express Authority in Point.

So far as any question that has not already been expressly adjudicated by this court can be regarded as settled as a matter of precedent and authority, this question is already settled in our favor. Four State courts of last resort of the highest authority have determined the precise point at issue in favor of the bankrupts and against the assignees, all upon the same general ground, namely: That, prior to the passage of the Act of 1882, the war-premium "claims" had not the elements of a *legal right* in them so as to pass under a general

assignment by operation of law. Only what exists in law can pass by mere operation of law.

Heard *v.* Sturgis, 146 Mass. 545.
Taft *v.* Marsily, 120 N. Y. (Court of Appeals), 474.
Brooks *v.* Ahrens, 68 Maryland, 212.
Kingsbury *v.* Mattocks, 81 Maine, 310.

The extreme limit to which the law has gone, or can properly go, is to hold (as was done in Comegys *v.* Vasse, 1 Pet. 193, and Leonard *v.* Nye, 125 Mass. 455) that, where this distinct *legal right* exists, the absence of a *remedy* against the Government shall not prevent its passing in bankruptcy. It has never been held that where, as in the case at bar, the legal right *as well as* the remedy was lacking, the mere "claim" would pass. The line has been drawn at that point; and it is clear that, if it were not, a main purpose of all bankrupt and insolvent laws — to wit, to relieve honest bankrupts and enable them to start again and acquire property and do business (See Traer *v.* Clews, 115 U. S. 528, 541) — would be defeated.

Besides referring to the opinions of these four State tribunals of last resort, and especially to that of the learned and distinguished jurist who spoke for the court in the Massachusetts case, we beg leave to refer to the able judgments to the same effect of the courts below in two of these cases, Taft *v.* Marsily, 54 N. Y. Supreme Court (47 Hun.), 175, and the Superior Court of Baltimore City in Ahrens *v.* Brooks, a pamphlet copy of which (pages 12–18) is herewith handed to the Court, and to counsel. All of these judgments were unanimous, except the one in Massachusetts where five justices out of seven, including the chief justice, concurred.

It would seem unnecessary, if not presumptuous, for counsel to attempt to add anything to the learned and exhaustive

discussions of the question in these cases, and idle to try to make the conclusion in our favor any clearer than it is there made. The line of reasoning is substantially the same in all the cases, was worked out contemporaneously and independently by the Massachusetts and Maryland courts, and by the Supreme Court of New York, and is, we respectfully submit, sound and unanswerable. If the reasoning of the opinion in the Maine case differs somewhat from that of the others, it is because the court in that case chose to distinguish the case at bar from the "exculpated cruiser" cases which it had just decided (Grant *v.* Bodwell, 78 Maine, 460, 465; Pierce *v.* Stidworthy, 79 Maine, 234), on the ground that the latter were for the destruction of tangible property, while the former was not, rather than on the well-settled and equally satisfactory distinction between "succession," — whether testamentary or intestate, — and assignment in bankruptcy (Holmes, J., in Heard *v.* Sturgis, 146 Mass. 545, 552; Rhoades *v.* Blackiston, 106 Mass. 334, 336). The reasoning of the Alabama commissioners was before all these State courts, and that of the dissenting opinion in Massachusetts was before the Supreme Court of Maine and the New York Court of Appeals; but both were, after full consideration, rejected.

It is respectfully submitted that a rule of law thus established in four great States — upon which very large sums of money must have been distributed during the past three or four years, not only in those States but elsewhere throughout the Union, where the rule has been tacitly accepted without new adjudication, and the question is no longer brought before the courts or considered an open one — should not now be lightly unsettled. "It is an acknowledged principle of law that if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public,

* See Newell *v.* West, 149 Mass. 529, 527

such rights ought not to be disturbed or impaired by a different construction." (Mr. Justice Brown, in Schell *v.* Fauché, 138 U. S. 562, 572.) The only one of these cases, except the present one, which was appealed to this court, was Brooks *v.* Ahrens, *ubi supra*, and in that case the writ of error was dismissed (131 U. S. 431) on motion of the plaintiff in error. We venture also to state that, in the Circuit Court of the United States for the eastern district of Louisiana, — where the same question had been argued, was pending, and was under consideration by the court in the case of Frank *v.* Ducros, — judgment was, on January 29, 1889, entered by the court in accordance with the above decisions, and no appeal was taken to this court. As no written opinion was filed, the case is not reported.

We believe no court, either State or Federal, has decided the question the other way; and we submit that the decision of the Supreme Judicial Court of Massachusetts acquires special weight from the fact that one of the justices participating in the decision of the case, and concurring in the conclusion reached, was the late General Charles Devens, who, as Attorney-General of the United States from 1877 to 1881, was the chief legal adviser of the government during the period when the war-premium claims were pending before Congress, and their character was under discussion.

But as no weight of authority, however great, outside of its own reports, is, strictly speaking, binding upon this court, even on a question which turns upon general legal considerations rather than upon those peculiar to Federal jurisprudence, and as the Court of Commissioners of Alabama Claims and two of the seven justices of the Supreme Judicial Court of Massachusetts have reached a different conclusion, a review of the case *de novo* seems to be called for.

General Review of Authorities on Assignability in Bankruptcy of Claims Against Governments.

The defendants in error who had paid enhanced premiums of insurance in 1861–65, went into bankruptcy in 1875, seven years before the passage of the Act of June 5, 1882 (22 Stat. 98), which authorized the payment of the war-premium claims from the unexpended balance of the Geneva award. The Act of 1874 (18 Stats. 245) had provided for the distribution of the money received from Great Britain in accordance with the judgments of the Geneva tribunal and the terms of the award, and, therefore, to all the persons who had, in any legal or judicial sense, any "right" to the money. It merely gave a remedy for the existing rights.

The latter point has been expressly held both negatively and affirmatively by this court, in holding, in accordance with the judgment of the Geneva tribunal, that the direct "claims" were not created as rights by the Act of 1874, that they existed against Great Britain before the passage of that act and even before the treaty (Bachman *v.* Lawson, 109 U. S. 659, and Great Western Insurance *v.* U. S. 112 U. S.), and that the war-premium "claims" did not arise under the treaty, and had no existence as "rights," until the Act of 1882 created them such against the United States (U. S. *v.* Weld, 127 U. S. 5).

If it were necessary for the purposes of the present case, it would be fairly open for us to contend that even the direct claims would not pass to assignees in bankruptcy; for Leonard *v.* Nye, *ubi supra*, was never brought before this court for review, and its authority must be regarded as somewhat impeached by the decision of the House of Lords in Burnand *v.* Rhodocanachi, L. R. 7. App. Cas. 333. It

might well be contended, in view of the latter very authoritative decision, that the true view of the law is that a "claim" to which even the remedy alone is lacking would not pass in bankruptcy; *i. e.*, that, in order to pass, it must be a complete legal right with also an adequate remedy capable of enforcement attached to it. At any rate, that case strongly fortifies our contention that where, as in the present case, both the elements of a legal right and the remedy are lacking, the "claim" will not pass. (See also Campbell *v.* Mullett, 2 Swanst. 551, 578, and Rustomjee *v.* The Queen, L. R. 12 B. D. 497.

The cases on the assignability in bankruptcy of pensions go upon the same distinction; namely, that an antecedent legal right possessing the *vinculum juris*, although without a remedy, — being against the government, — will pass to the assignee; but that a mere equitable claim, which not only lacks the remedy but would not be a legal right if a private individual stood in the government's place, will not pass.

In re Webber, 18 Q. B. D. 111.
In re Wicks, 17 Ch. D. 70.
Gibson *v.* East India Co., 5 Bing. N. C. 262, 274.
Ex parte Hawker, 7 Ch. App. 214.
Innes *v.* East India Co., 17 C. B. 351.

These grants of money do not pass in bankruptcy, because they are only "imperfect obligations, — obligations which want the *vinculum juris*, although binding in moral equity and conscience . . . of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law."

Tindal, C. J., in Gibson *v.* East India Co., *ubi supra*.

The same principle is recognized *in re* Huggins, L. R. 21

Ch. D. 85, where the pension was held to pass in bankruptcy, on the ground that the right to a pension on retirement was an original condition of the acceptance and tenure of the office, although the pension had to be annually voted afterwards by the Colonial Legislature.

Precisely the same test governs the decisions of this court as to claims against the government; namely, that, "*if based upon considerations which would be valid between individuals*," they are property and pass to the assignee, "although their recognition and payment depend upon the caprice or favor of the Legislature;" otherwise not. Mr. Justice Field, in Erwin *v.* U. S., 97, U. S. 392, 396. Or "had a similar claim existed *against an individual*" so that "he *could have recovered by suit*," it would pass; otherwise not.

Milnor *v.* Metz, 16 Pet. 227.

Upon this line of judicial distinction, even if we assume that the direct claims would be held by this court to pass in bankruptcy, the war-premium claims clearly do not. They were not "rights" in 1875, either (1) against Great Britain or (2) against the United States.

1. Against Great Britain.

It would seem to be too late seriously to ask a court of law to hold that the war-premiums were a legal "right" — or possessed the *vinculum juris* — against Great Britain. The authoritative judgment of the Geneva tribunal (*supra*, p. 5) against the indirect claims; their withdrawal by the United States (*supra*, p. 5); the action of Congress in disregarding and omitting them in the Act of 1874, in what, for aught that was then known would be, and was presumed to be, a final and complete distribution of the award; and the decision of this Court in U. S. *v.* Weld, *ubi supra*, — leave little ground for the contention to stand upon.

Aside from this weight of authority on the point, our present proposition is inherently sound. In the case of the enhanced war-premiums neither of the essential elements of a tort sounding in negligence was present, and there was no actionable wrong. In the first place, they were not caused by the negligence — or failure to exercise "due diligence" — of Great Britain, for they were the result of the Confederate cruisers generally upon the ocean, including many "inshore" and other exculpated cruisers (*supra*, pp. 2, 6) and were incident to the state of war; in the second place, they were too remotely and indirectly the consequence of the cruisers' acts to create a liability in tort, even if Great Britain were responsible for all the cruisers. They were *damnum absque injuria*. The foundation of legal right was wanting.

The soundness of this position is emphasized by the contrast which the case of the "direct" losses, so called, caused by the "Alabama," the "Florida," and the "Shenandoah" after leaving Melbourne, presents. In the case of the "direct" losses, the essential legal elements of a tort sounding in negligence concur, to wit, property destroyed by a dangerous agency let loose by the negligence of another, as in the familiar cases of dangerous animals, or an accumulated mass of water in a reservoir; a clear legal right existed, and an adequate remedy by action at law alone was wanting. It is precisely upon this ground of a legal right against Great Britain that the court founded its decision in Leonard *v.* Nye, *ubi supra*, a case of a cargo destroyed by the "Shenandoah" after leaving Melbourne: —

"The claims for the destruction of property of citizens of the United States by the 'Alabama' and the 'Florida,' and by the 'Shenandoah' after her departure from Melbourne, through the violation by Great Britain of her international duty, were claims for which the owners of the property destroyed were *justly entitled to compensation from Great Britain;* although they could not obtain their rights in the

ordinary course of judicial proceedings, but only by petition to the British government, or through the interposition of their own government. Compensation for those losses was demanded by the United States *from Great Britain as a matter of right, and as such was awarded* by the decision of the Tribunal of Arbitration. . . . It must, therefore, be treated as awarded and paid to him by reason of his interest in property so destroyed, and of his right to compensation for its destruction."

Gray, C. J., in Leonard *v.* Nye, 125 Mass. 455, 465-6.

And Bachman *v.* Lawson, *ubi supra*, — the case of a ship and cargo destroyed by the "Florida," —proceeds upon the same ground: —

"The money so demanded and received by the United States from Great Britain, and paid by the United States to the defendant, was money collected on the claim described in the agreement."

Mr. Justice Gray, in Bachman *v.* Lawson, 109 U. S. 659.

The latter case decided that Bachman's right was not created by the Act of 1874, but existed before against Great Britain. That decision, supplemented by United States *v.* Weld, *ubi supra*, which held that Weld's right was created by the Act of 1882, so that the court of claims had jurisdiction, and did not exist against Great Britain under the treaty, in which case the court of claims would not have had jurisdiction; and by Great Western Ins. Co. *v.* U. S., *ubi supra*, that the direct claims were not created by the Act of 1874, so that the court of claims did not have jurisdiction of them, — places the distinction in as strong a light as it is possible for judicial authority to put it.

It may be added, however, that, even if the war-premium claims were originally legal rights against Great Britain, that fact would be immaterial now and for purposes of cases like the present, the money not having been awarded and paid to the United States by virtue of such a right. The existence of such a right could thereafter only serve as a good moral consideration why Congress should, as it did in 1882, pay the

war premium claimants either out of the balance of the award or from any money in the treasury.

2. Against the United States.

It cannot be contended that there was so much as the shadow of a legal right against the United States in 1875, when we assigned, or until the passage of the Act of 1882, which created the right, and the remedy for it, at the same moment.

The United States had not caused our losses, had collected no money on our account, and by the Act of 1874 had distributed the money collected to others. Whether the Act of 1882 "relates back" to 1875, we have considered in our discussion of that Act (*post*, pp. 30–2), and of the opinion of the Alabama Commissioners (*post*, pp. 43–4), and of the dissenting opinion of Mr. Justice Field (*post*, p. 50).

The Act of 1882.

A balance being left over, Congress gives it, in 1882, to those more remote and indirect sufferers who had been held by the Geneva tribunal not to have the elements of a legal right against Great Britain, and who *a fortiori* had no legal right against the fund awarded at Geneva or against the United States. This action of Congress was a sovereign legislative act, giving the money to those sufferers whom the government had contended at Geneva, though unsuccessfully, ought to be compensated, and who therefore had a strong moral and equitable claim on the bounty of the government. It was not, and under the Federal Constitution could not be, a judicial act "relating back" and deciding who, at the time of the loss and of *lis mota*, had "rights" cognizable by the law. Such judicial acts could only emanate from judicial tribunals of competent jurisdiction, — the Geneva tribunal in the first

instance, the Federal and State courts in the last resort. The Act of 1882 does not even profess or attempt to construe, or declare retrospectively, the meaning of the Act of 1874, which might possibly be within the constitutional power of a legislative body, if the earlier Act were ambiguous or in any way open to construction in this regard. The Act of 1874 was perfectly explicit and clear as to who, and who alone, was entitled to share in the fund, and therefore, by necessary intendment, as to who was not so entitled, *expressio unius exclusio alterius*. The Act of 1882 simply says what shall be done with the surplus, dealing with it prospectively, *de presenti* and *in futuro*, as all legislative Acts are presumed to do unless the contrary clearly appears.

Potter's Dwarris on Statutes, 165–6.

When Congress intends, even in matters clearly within its constitutional power, to make its Acts "relate back," it expresses that intention unequivocally; as when it in terms provides that an assignment in bankruptcy shall "relate back" (Rev. St. Sect. 5044) to the commencement of the proceedings, and shall by operation of law vest the title of property as of that date in the assignee.

The Act of 1882 is, therefore, the legislative creation of a legal right of antecedent moral and equitable considerations, satisfactory to the mind of the sovereign legislative body. The Act of 1882 pointedly omits the word "assignees," in describing the recipients of the money. The Act of 1874 had incidentally mentioned "assignees" in Sect. 12, showing that Congress regarded the direct claims as assignable at least by contract, if not by mere operation of law; and its omission in the corresponding clause in the Act of 1882, Sect. 6, therefore emphasizes the legal distinction in this respect between those claims and the war-premium claims.

The Act of 1882 is simply a grant of money from the treasury to us as members of a class described in the act. In the strict legal sense, all such grants of money — even where there is already a legal right existing against the government, as in the case of the direct claims — are gratuities, or acts of mere bounty, because such is incapable of enforcement for lack of a remedy. In the sense contended for by the plaintiff in error, no legislative grant of money is a gratuity, or act of bounty, because the considerations on which such grant is, or is presumed to be, made — however purely equitable and without the elements of legal right in themselves — become, in that view, legal rights by relation, from the mere fact that the Legislature afterwards acts upon them. Of the two views the former is the sounder, and has very high judicial authority (see Burmand *v.* Rhodocamachi, *ubi supra*, and similar cases), while the latter has none in courts of last resort. But the defendants in error do not need to insist upon the former view. They can rest upon the middle view taken by this Court, that the claim passes if it is such as would be valid against an individual, otherwise not. And that in the latter contingency a subsequent legislative act, like that of 1882, is in the nature of a gratuity, or bounty, to the persons named in it, and as of that date, and the money does not go by relation to an assignee under a precedent assignment.

The Act of 1882 does not "relate back" to, or "recognize," or legalize claims *nunc pro tunc*, except in the general sense in which any legislative grant of money relates back to, or recognizes, the pre-existing considerations on which it is based. Those considerations do, or do not, constitute property assignable bankrupt according as the circumstances existing at the time, irrespective of the subsequent statute, make up the elements of a legal right. So far as

there is any "equity," as between the original sufferers and their creditors ten years after the war, to determine whether a fiction shall be invoked to make a present grant of money to us "relate back" so as to go to somebody else, we submit that the equity is wholly with us, the beneficiaries named in the Act. No fiction can override the settled law and fact that in 1875 we had no legal right.

The Debates in Congress.

Although, as we contend, there is no ambiguity whatever in the Act of 1882, and no suggestion in its language that creditors, or assignees by operation of law, were contemplated as the beneficiaries or grantees of the government, still the almost uniform language used in debate about the war-premium claims by the leading members of both houses of Congress, and especially of the Judiciary Committee which reported the bill, and including the opponents as well as the advocates of payment of the war-premiums claim, is suggestive as showing how Congress in fact regarded the grant and as corroborative of our view. It was treated throughout as a sovereign political act based on grounds of general justice and equity, not at all as a judicial act based on, and supplying merely a remedy for, any existing legal right, and the claims of the underwriters were treated as having only the same basis; and the final action of Congress was simply a political act in favor of the war-premium claimants as having the superior equity. Nowhere in the debate are creditors, or assignees in bankruptcy, or other assignees by operation of law, mentioned as the recipients of the nation's bounty, but everywhere the meritorious and patriotic citizens who paid the premiums.

Thus Senator Edmunds said: —

"*They adhered to our side* — just as in a thousand instances that occur from Congress to Congress, where some special calamity or hardship has fallen upon some special citizen or class of citizens of our Commonwealth, *the justice of Congress in its political character and in its political sense* gives them, out of the contributions of all, something to make it good."

Congress Records 46th Congress, 2d Sess., Vol. 10, part 3, page 2551, etc.

Senator Thurman said: —

"What, then, are we to do with it? Are we to keep it in the treasury to use it as part of the general resources of the treasury in defraying the expenses of government, or are we to make some disposition of it *which shall help to alleviate the losses of the men who suffered in the war?* I think we ought to do the latter. . . . I think one class has precedence over another in the strength of its *claim upon the generosity of the government.* I think that those whose property was destroyed by the exculpated cruisers stand in a better light, *not demanding, but asking, of the government to alleviate their losses,* than do the men who simply paid enhanced rates of insurance."

This precedence was accordingly given by Section 5 of the Act of 1882.

Ibid., part 2, page

Mr. Humphrey of Wisconsin, of the House Judiciary Committee, said: —

"I shall never object to paying them upon any principle that will permit them to come here and claim it as a matter of mere grace. But I hold that every individual must claim as a matter of grace, anything which the government may conclude to pay him out of this award. . . . No sovereign government, standing in the position we occupy in regard to this fund, can occupy any other legal position."

Mr. Converse said in the House: —

"The American merchants and ship-owners (all honor to their names!) had the courage and patriotism to pay their war-premiums and ship their goods and sail their vessels under the American flag, defying all opposition on the ocean. *Their patriotism, their love of*

country, that energy which American merchantmen and American sailors have everywhere displayed, kept our flag upon the ocean in that dark hour."

Ibid., Vol. 13, part 7, page 302, Appendix.

The Leading Cases Examined.

In *Comegys* v. *Vasse*, 1 Pet. 193, the claim which was held assignable in bankruptcy before the Act of Congress providing for its payment was a clear *legal right* sounding in tort, lacking a legal remedy only because the tort feasor was a sovereign power — Spain. Vasse was an underwriter on vessels and cargoes wrongfully captured by Spain and abandoned by the owners to the underwriters, and he paid the losses before 1802. In 1802 he went into bankruptcy, and was discharged May 28, 1802. In 1819 a treaty between the United States and Spain provided for the payment of these losses; and payment was accordingly made by Spain to the United States; and in 1824 the sum in question was paid by the United States to Comegys, the assignee in bankruptcy of Va-se, whom Vasse sued for the same. It was held that the assignee should retain the money on the ground that Vasse had at the time of his bankruptcy a legal vested right (pages 220, 221), first against Spain sounding in tort, then against the United States upon the fund awarded in compensation for his losses and the similar losses of other persons.

In *Plater* v. *Scott*, 6, Gill *v.* Johnson, 76, Plater owned negroes which were deported by British naval officers in 1814. In 1822 Plater went into insolvency,—the defendant Scott being his assignee, — and was discharged in 1823. In 1826 a convention was entered into between the United States and Great Britain, by which the latter paid to this Government a sum of money in compensation for the said

losses suffered by Plater, and for similar losses suffered by other American citizens, and in 1828 the United States paid the money in question to Scott, the assignee. It was held that the assignee was entitled to hold the money, on the ground that the *legal right* was perfect against Great Britain, and was therefore property assignable in bankruptcy, as if it were a legal claim by "citizen against citizen," capable of being "coerced by the process of judicial tribunals."

In Emerson *v.* Hall, 13 Pet. 409, Emerson had unsuccessfully sued the Government for a portion of the proceeds of the brg, Josefa Segunda, seized by him as surveyor of the port in 1818, and condemned for violation of the law prohibiting the importation of slaves. Thereupon Congress, in 1831, granted to the heirs of Emerson, who had died, and to others, the proceeds of the seizure, and the money was claimed by creditors of Emerson. It was held that as Emerson had no legal right to the proceeds, — though he had a complete remedy by judicial process in the condemnation proceedings if his right had been valid, — his claim was not property which his creditors could take. His claim had already been defined by the court as one under which "nothing could be claimed by him except from the bounty of the Government," — The Josefa Segunda, 10 Wheat. 312,331, — and those words exactly and fully describe the nature of our war-premium "claim" on Aug. 5, 1875. (See Gillan *v.* Gillan, 55 Penn. St. 430.)

In Milnor *v.* Metz, 16 Pet. 221, Milnor and Thompson, gaugers at the port of Philidelphia, had done extra services in 1836 and 1837, rendered necessary by an act of Congress passed July 4, 1836 (5 Stats. 125, 126), reducing the duty on wines. In 1838 Milnor went into bankruptcy, — Metz being his assignee, — and was discharged in 1839. In 1840 Congress directed the payment to Milnor and Thompson of $2,757.23, "being the amount of fees equitably due to said

Milnor and Thompson for extra service rendered by them as gaugers at the port of Philadelphia, after the passage of the act of the fourth of July, eighteen hundred and thirty-six, reducing the duties on wines, in regauging certain wines then in customs stores at said port, and coming within the provisions of said Act" (Stats. 1840, Chap. 14, 6 Stats. 798), and the question was whether the assignee was entitled to the money. It will be noticed that the act of 1836 applied (Sect. 3) to wines imported *before* the passage of that act, and therefore already once gauged, so that the compensation of gaugers, three cents per case (Stats. 1799, Chap. 23 Sect. 2, 1 Stats. 707), and not exceeding $1,500 per annum (Stats. 1835, Chap. 30, Sect. 3, 4 Stats. 771) had already been fully earned as to such wines. The service performed in the regauging required by Congress in the Act of 1836 presented therefore a clear case of *quantum meruit* against the Government for compensation for additional services not already required or paid for, — the right of action alone being wanting, and the "claim" for such compensation was clearly a *legal right* passing to the assignee, as the Court held.

(NOTE. The report of this case incorrectly quotes the Act of 1840, using the words (16 Peters 225, lines 4 and 5) "commencing with" instead of "coming within" the provisions of said Act.)

In citing Milnor *v.* Metz, in his dissenting opinion in Heard *v.* Sturgis (146 Mass. 545, 557), Mr. Justice Field misstates in one very material particular the facts of that case when he says that Milnor was upon a salary of $1,500 a year. A salaried officer is paid by his salary for his whole time, and therefore for all the gauging he might do within business hours during the year. Regauging would, under those circumstances, not be, strictly speaking, an extra service at

all, or one for which he could maintain a *quantum meruit* even against a private individual. Any claim he might have for additional compensation would be a claim only upon his employer's generosity, and a payment of it would be, in the strict sense, a gift or gratuity, which would not pass to his assignee. If, on such a state of facts, this Court had held that the money belonged to the assignee, its decision might have been an authority for the position in support of which Mr. Justice Field cites it; but, upon the actual facts, *i. e.*, Milnor being paid *by the case*, regauging was distinctly *an extra* for which he had a legal *right* to compensation, though remediless, and the decision is, therefore, no authority for holding that war premiums which were not a matter of right, passed to assignees.

In Erwin *v.* United States, 97 U. S. 392, cotton belonging to Irwin had been seized by the military forces of the United States in Feburary, 1865, sold, and the proceeds paid into the Treasury; in December, 1868, Irwin went into bankruptcy, his right to prosecute his claim under Sect. 1861, Chap. 120, Sect. 3 [12 Stats. 820] being then barred by lapse of time; in 1877 Congress waived the lapse of time and specially conferred jurisdiction of his claim upon the Court of Claims [19 Stats. 509], which dismissed his petition, and he appealed to this court. It was held that the claim passed to the assignee. The seizing of his property in 1865 gave him an immediate vested legal right to compensation from the Government under the Act of 1863. He appears to have been at the time an officer in the Confederate army, but the President's amnesty proclamation of May 29, 1865 [13 Stats. 758] cured that defect retroactively by granting "restoration of all rights of property, except, etc., before his assignment in bankruptcy. The Court lays down the precise rule which we are contending for in this case: —

"Demands upon the Government, *if based upon considerations which would be valid between individuals*, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment depend upon the caprice or favor of the Legislature" [97 U. S. 396].

In Phelps *v.* McDonald, 99 U. S. 298, McDonald, a British subject, owned cotton burned in 1865 by military officers of the United States; in 1868 he went into bankruptcy, Phelps being his assignee; and on Sept. 25, 1873, an award was made to him by the commissioners, under the treaty of May 8, 1871, with Great Britain, "to be paid in gold by the Government of the United States to the government of her Britannic Majesty in respect of the above claim." McDonald's right, sounding in tort, to compensation from the United States was an immediate and vested one the moment his cotton was burned. He had acquired title to the cotton under permits from the Secretary of the Treasury and letters from the President, though the law authorizing such permits was repealed before he could remove the cotton. His right to compensation was held to pass to his assignee, the Court saying: "It is enough that *the right* exists when the transfer is made, no matter how remote or uncertain the time of payment." [Chap. 304]

The House of Lords has held in Burnand *v.* Rhodocanachi, L. R. 7 App. Cas. 333, that even the direct Alabama Claims were a gift of gratuity from the United States to the owners of destroyed property, who therefore had, before the Act to 1874, no such legal right to compensation as would pass by subrogation to underwriters, the legal right being created by the Act of 1874, and being non-existent before.

That case held that where the owners had received payment from the United States Government for the value of a

cargo destroyed by the Alabama over and above the amount of their insurance, the underwriters who had paid the loss could not recover it from them. It was conceded that if the owners had an absolute legal right to the money the underwriters would be subrogated to that right and could recover. The decision, therefore, was that the owners had no such legal right, and that the subsequent payment by the United States Government was a voluntary gift to the owners which they could retain according to its terms, viz., for their loss above the amount received from insurance, although it was above what they had themselves agreed in the valued policy was the value of the goods.

We may safely concede that although all grants by the Government are in a strictly legal sense gifts or gratuities, in that they lack the complete *vinculum juris*, including the remedy, this case would not be followed by this court, — at least so far as to hold that the direct claimants had no right assignable in bankruptcy, — and that Leonard *v.* Nye would be followed on that point. Indeed Bachman *v.* Lawson, 109 U. S. 659, virtually held, as we have seen, that such a right ante-dated the Treaty, and arose upon the destruction of the property by cruisers for which Great Britain was responsible, and was in no sense created by the Act of 1874. But this Court has already in effect drawn the line, on this question, between the "direct," and the war-premium claims. In Great Western Insurance Co. *v.* United States, 112, U. S. 193, it was held that the direct claims were not rights created by the Act of 1874, but ante-dated it as rights, and, therefore, did not confer upon the Court of Claims, under Rev. Stat. Sect. 1059 jurisdiction of the claim of an insurance company which had paid losses. It was, therefore, by necessary inference,—indeed expressly,— held that the direct claims grew out of the Treaty which recognized those claims

as rights already existing, and valid, provided the facts were proved, and submitted them to a tribunal of arbitration where the facts constituting what would be legal liability on the part of a private individual were proved against Great Britain, and damages awarded and paid accordingly.

In United States *v.* Weld, 127 U. S. 51, on the other hand, this Court held that the war-premium claims were originally created by the Act of June 2, 1882, which provided that the expenses of the Geneva Tribunal should not be deducted from the fund to be distributed to the war-premium claimants, and did not ante-date it, and did not grow out of the Treaty; and that consequently the Court of Claims did have jurisdiction of them under Sect. 1059. If the Act of 1882 "related back" so as to vest the war premiums in our assignee in 1875, as claimed by the plaintiff in error, it would equally relate back so as to deprive the Court of Claims of jurisdiction, which this Court expressly negatived in U. S. *v.* Weld, *ubi supra*.

These two decisions establish clearly the very distinction on which we rely; and the line of distinction thereby established leads irresistibly to the conclusion that, while the direct claims were rights which would pass to assignees in bankruptcy before the passage of the Act of 1874, and even, as in Leonard *v.* Nye, and Phelps *v.* McDonald, before the Treaty, the war-premium claims were not such rights until after the Act of 1882.

The Rule Deducible from the Authorities.

The true rule to be deduced from the decisions of this Court may be summed up as follows: A legal right existing at the date of the assignment is, in the eye of the law, property and passes to the assignee, though there be no remedy for enforcing it by judicial process. Where, however, there

is neither remedy nor the constituent elements of a legal right, the claim or expectancy does not pass, and the subsequently created right dates from the time of its creation and goes to the claimant or to his legal representatives or to his assignees by contract, and becomes assignable by operation of law (as in bankruptcy) only *after* the creating act. Any other rule would defeat the whole purpose of a bankrupt law — the relief of honest traders — and prevent the bankrupt from ever acquiring property after his assignment; for any acquisition he might make would necessarily be connected more or less remotely by some slender chain of cause and effect with transactions or events ante-dating his bankruptcy, and, therefore, under such a rule, would go to the assignee. The line must be drawn at the point we have indicated or not at all. It is submitted that the authorities on the general subject sustain this ground.

The only judicial authority opposed to our view is the opinion of the Court of Alabama Commissioners, by French, J., on the Bankruptcy question, dated March 3, 1884 (No. 13 of Opinions, Rules, etc., for 1885, pages 4–9), and the dissenting opinion of Mr. Justice Field in this case (146 Mass. 552–58).

The Opinion of the Alabama Commissioners Examined.

The opinion of the Alabama Commissioners proceeds upon the ground (1) that as the Government could not be compelled to pay the direct claims any more than the war-premium claims, the former were no more a matter of legal right than the latter are; and, therefore, as the former passed to assignees in bankruptcy the latter should; (2) that neither the Act of 1874 nor that of 1882 "distributes alms," and the latter act "dispenses justice" as much as the earlier; and (3) that the Act of 1882, as well as the Act of

1874, "relates back," and, therefore, "recognizes" or legalizes the "claims" as of a date preceding our assignment in 1875.

This reasoning is legally unsound throughout.

In the first place, it ignores the distinction between right and remedy; between a case where the fundamental elements of a legal right are absent and a case where those elements are present and remedial process alone is lacking. We think that we have shown that the war-premium claims come within the former category, while the direct claims came within the latter. It is respectfully submitted that this important distinction was missed, by reason of using the convenient, but vague, word "claim" to describe the two subject matters, — a word broad and indefinite enough in common parlance amply to cover both, — and from that common description inferring a legal identity between the two.

A "claim" may or may not be a legal right. Although the word is used appropriately enough in both the Act of 1874 and that of 1882, its use is expressly avoided in describing what passes to an assignee in bankruptcy, and no word less definite than "estate" or "right" is there used (R. S., §§ 5044, 5046).

In the second place, "distributing alms" and "dispensing justice," when applied to legislative acts, are vague and misleading terms.

In the popular sense of giving pecuniary aid to sufferers by flood, fire, earthquake, failure of harvest, and the like, undoubtedly neither act "distributes alms"; in the sense, however, of granting money to meritorious petitioners who could not make out a case satisfying the requirements of law, the Act of 1882 did "distribute alms," or, to use the commoner phrase, give a "gratuity," while the Act of 1874 did

not do so, but simply gave a remedy by judicial process for a pre-existing legal right.

Again, in the sense of making a fair and equitable — if not the most fair and equitable — distribution of the Geneva Award, both acts undoubtedly "dispense justice"; but, in the legal sense of giving money to persons who could obtain judgment in court, if there were a court having jurisdiction of their cases, the Act of 1874 does "dispense justice," and the Act of 1882 does not.

The Act of 1874 "dispensed justice" in the sense of giving the direct claimants the power to enforce payment of money to which they had a clear legal right. The only sense in which the Act of 1882 "dispenses justice" is that it gives money to persons to whom, although they had no legal right to it, it seemed on the whole fairer to give it than to turn it into the general treasury, or give it to the insurance companies, or return it to Great Britain.

It is obvious that any such common characterization of the two acts — however convenient, and however true in a broad, general sense — is worthless as the foundation for an accurate legal conclusion.

In the third place, neither act "relates back," or in any accurate sense legalizes a pre-existing claim as of an earlier date *nunc pro tunc*. The reason why the direct claims were held assignable in bankruptcy before the Act of 1874 was because they were existing legal rights which passed to the assignee, who then became entitled to avail himself of any means of enforcing those rights which should thereafter be given by Congress, and the Act of 1874 gave such means. The war-premium claims, on the other hand, were not legal rights until the Act of 1882 made them so, and therefore did not pass by assignments by operation of law made before that act, though they might well have passed

by executory contracts of the parties specifically enforceable in equity whenever the right should accrue (see Kingsbury *v.* Burrill, 151 Mass. 199, 203–4). The fact that the remedy against the Government was given simultaneously and by the same act does not make the act any the less the first creation of those rights. Each act speaks only from, and as of, the date of its passage. Neither act is retroactive or retrospective. Judicial decisions relate back to the origin of the cause in hand; but legislative acts are purely prospective unless expressly made retrospective.

The fact, dwelt on by the learned commissioner, that the representatives of the United States at Geneva contended there that the war-premium claimants had a good case against Great Britain is of no avail now, in view of the adverse final decision of the Geneva Tribunal; and it is also immaterial in the present controversy, because, even if that contention were well-founded, it could give us no legal right in a fund into the composition of which the war-premium damages did not enter, and consequently no right against the United States at all.

The opinion relies (page 8) upon the use of the word "assignees," in the Act of 1874, Sect. 12, and the fact that the Act of 1882 revives the provisions of the Act of 1874 "except as changed and modified" by the Act of 1882. But the Act of 1882 does "change and modify" the Act of 1874 in this respect; for Sect. 6 of the latter act, in dealing with the corresponding subject matter, provides that the Court shall "deduct any sum received by any claimant as an idemnity . . . so that the actual loss of such claimant only shall be allowed," — expressly omitting all mention of assignees. Moreover, even in the Act of 1874, the word "assignees" would seem to be used as a word of limitation rather than of purchase, — *i. e.*, to apply only to as-

signments made after the passage of the act; and this view is fortified by the fact that the courts do not at all rely upon the use of the word in the Act of 1874 in holding that the direct claims pass to assignees under assignments made before the enactment of the Act of 1874, but base their decision purely on the pre-existing legal right antedating the statute (see Leonard *v.* Nye, *ubi supra*).

THE DISSENTING OPINION OF MR. JUSTICE FIELD EXAMINED.

It is respectfully submitted that the learned dissenting justice is in error in saying (pages 553, 554), "that in the case at bar it must be determined from the acts of Congress whether the money thereby appropriated was intended as a gratuity or as compensation for services rendered," and it is submitted that it is immaterial whether Congress intended it or regarded it as a g atuity or not. The question is whether it is, in legal effect, a gratuity or not; and that depends upon the facts of the case and the circumstances upon which the grant of money is made. It is the opinion of the Court, not of Congress, that is decisive as to whether a given grant of money is in law a gratuity or the satisfaction of a right. The only thing to be determined from the Act of Congress is who is the grantee of the money; and if there were any ambiguity on the face of the act as to whether claimants, or their assignees in bankruptcy, were the grantees of the money, that ambiguity would be settled by the examination of the act, and perhaps of the debates in Congress; but the opinion of Congress, or of its members, on the abstract legal question whether such a grant of money is a gratuity or payment of a debt is wholly immaterial and incompetent; much less is it decisive as to how the Court shall treat the grant when the question arises collaterally in a case pending between third parties. The question is one for judicial, not legisla-

tive, decision. In the Act of 1882 there is no ambiguity as to who are the grantees of the money.

The case of Milnor *v.* Metz, 16 Pet. 221, cited by Judge Field on this point, furnishes no support for his proposition (see ante pp. 35–7). The decision in that case in favor of the assignee rests wholly upon the fact that the bankrupt had, by reason of his extra services, a legal right against the Government before the act granting the money was passed, and not at all upon the language or intention of Congress, or its opinion as to whether the grant was a gratnity or not, or its characterization of the transaction. The result would have been the same if the act of Congress had contained no reference to "the amount of fees equitably due, etc", the fact and not the recital being the decisive consideration. The result would have been the same even if the Act of Congress in that case, or in Comegys *v.* Vasse, or in Leonard *v.* Nye, had expressely called the grant a gratuity or bounty; and in our case, even if Congress had described this grant of war premiums as the payment of a debt or the satisfaction of a legal right, the assignee would not be entitled to the money. The *facts upon which the act is based*, not the attempted characterization of them by Congress, decide the question of law. In fact the Act of 1882, like that of 1874, is wholly silent as to whether Congress or its members regarded the grant as a gratuity or otherwise. It simply directs the payment of the money in satisfaction of certain "claims," leaving to the courts all questions as to the legal character both of the respective claims themselves and of the grant of money.

As the dissenting opinion truly says (Rec. pp. 18, 19); "Congress did not in these statutes specify the persons entitled to receive the money otherwise than by describing the claims to be admitted," except that the recipients must be "persons entitled at the time of the loss to the protection

of the United States in the premises," and persons " who at all times during the late rebellion bore true allegiance to the United States." There is no room for construction, no question of intention here; there is not the remotest suggestion of assignees in bankruptcy or of creditors. It is a plain grant of money to the original sufferers, who are necessarily to receive it, unless the facts and circumstances attending the original loss and the arbitration and award up to the time of their assignment in 1875, are such that on the principles of law the assignee became entitled to it by that assignment. That is a question upon which Congress has been silent and which is therefore within the sole and exclusive cognizance of the judicial tribunals in applying the principles of law. The error of the dissenting opinion in this connection lies, we submit, in regarding Congress as a "judicial tribunal" (Rec. p. 18), determining who was entitled to the money. Such a tribunal's decree or expression of intention that the award of money was not a gratuity and accordingly passed to assignees, would be decisive and final, — as all decisions of courts of last resort are. Congress, however, is not a judicial tribunal, but a sovereign legislative body, which might, indeed, grant the money to anybody it chose on such considerations of equity, propriety and expediency as appeared to it satisfactory, but whose acts are legislative acts, and whose expressions of opinion on a purely judicial question, even if clearly expressed in the act or in the debates, do not control the courts or justify them in decreeing the money to persons not mentioned as beneficiaries in the act, unless the facts and circumstances show clearly that those persons are on legal principles entitled to the money as against the beneficiaries named in the act. The question upon the statute is not whether Congress intended the grants as gratuities or not; it is whether Congress has in fact granted the

money to the original sufferers or to assignees in bankruptcy.

Undoubtedly, the judicial courts could not give the money to the original sufferers if Congress had said that assignees or creditors in bankruptcy should have it. The action of Congress is final; and undoubtedly "it is not competent for this Court to decide whether Congress in fact rightly appropriated it or not" (page 19). It is not a question of right or wrong: whatever Congress chose to do with the money is to be taken as right by the courts. The question is whether, — when Congress, so far as it has mentioned anybody, has mentioned only the original sufferers, — the Court finds such a state of facts surrounding the transaction at the time finds of the assignment as entitles the assign eeunder the principles of law to take it for the creditors of the original sufferers. On that question, the supposed opinion of Congress as to whether the grant was a gratuity or not, or as to just what constitutes in law a gratuity as distinguished from payment of a legal obligation, is immaterial. So far as the Act of 1882, by mentioning only the original sufferers, and not creditors or assignees, shows any opinion of Congress on the subject, it indicates that Congress regarded it as a gratuity or act of bounty to those sufferers; but if it had given no such indication of opinion, or indicated the opposite opinion, the result would be the same in a judicial tribunal.

It does not follow, as Judge Field argues, that, if the grant of war premiums is a gratuity as distinguished from the satisfaction of a legal right, the award of the Court of Commissioners of Alabama Claims to assignees is a final decision, binding upon the judicial courts. It is well settled that the decision of the commissioners is only *prima facie*, and that the judicial courts are to determine, from the statute and the antecedent circumstances and considerations, the

rights of parties to the money; and, so far as that right depends upon whether the grant of war premiums is a gratuity or not, the judicial courts are necessarily to determine that question too.

The *ratio decidendi* of all the leading cases on this subject matter is *the legal character of the antecedent claim*, as shown by the facts, not the supposed opinion of Congress as to that character or as to whether the grant of money is a gratuity or not. The opinions of the Court in all these cases discuss and base their conclusions upon those facts.

Thus in Emerson *v.* Hall, 13 Pet. 409, the decisive fact in the minds of the Court was that though "in the seizure and prosecution of the vessel for a violation of law, Emerson, with those who co-operated with him, rendered a meritorious service to the public," yet "he acted under no law, nor by virtue of any authority," and his acts imposed no obligation, either in law or in equity, on the Government to compensate him for his services.

13 Pet. 412.

It is true, the Act of Congress in this case mentioned the representatives of Emerson as grantees, still this language in itself no more excludes creditors than does the mention of the original sufferers in our case.

In Milnor *v.* Metz, 16 Pet. 221, the determining fact is that "the services performed by Milnor were at the instance of the Government, and necessary to execute the Act of 1836" (16 Pet. 326), and that, "had a similar claim on the part of Milnor existed *against an individual* instead of the Government, there can be no doubt he could have recovered by suit."

16 Pet. 227.

So in Comegys *v.* Vasse, 1 Pet. 193, the decision rests on

the facts that Vasse had insured vessels which were captured by Spain, and abandoned to him by the owners, and had paid the losses, and the United States had received from Spain, under a treaty, money on account of said losses (1 Pet. 210), and "that the claim under consideration was completely vested in right and interest in Vasse at the time of the bankruptcy." (1 Pet. 220.)

In none of these or other leading cases is there the slightest suggestion that the supposed opinion of Congress as to whether its act was conferring the satisfaction of a right as distinguished from a gratuity was to guide the Court, or was even material to the determination of the question between the bankrupt and his creditors, or that the statute "related back" so as to create *ex post facto* a right as of a date when in fact none existed. When Congress intends an act to "relate back," it says so expressly, as in Rev. St., Sect. 5044.

Contingent or Expectant Claims Generally.

To the same effect are the decisions that future wages under an engagement not yet entered into are not assignable.

Mulhall *v.* Quinn, 1 Gray, 105.
Twiss *v.* Cheever, 2 All. 40.
Herbert *v.* Bronson, 125 Mass. 475.

So claims that are merely personal, and not based on breach of contract, or on a tort to real or personal property, are not assignable even after verdict.

Gray *v.* Bennett, 3 Met. 522, 526, 527.
Stone *v.* Boston & Maine R. R., 7 Gray, 539.
Rice *v.* Stone, 1 Allen, 566, 569, 570.
Linton *v.* Huxley, 104 Mass. 353.

The act of increasing the cost of plaintiffs' insurance,—assuming, for the purposes of the argument, that the act is a

tort at all, and that the increased cost is the natural and proximate result within the rules of the law — is not a tort to property real or personal, nor a breach of contract. It is a personal injury pure and simple, as much as defamation with special pecuniary damage to a man in his profession, boycott, strike, assault without battery, false imprisonment without personal contact, malicious prosecution, malicious abuse of legal process, interference with a personal trademark, or any other similar case of pecuniary without physical injury. The right to recover pecuniary compensation for it — assuming the existence of such a right — is, therefore, as purely personal, and consequently non-assignable, as in those cases.

Gray *v.* Bennett, 3 Met. 522, 526, 527, cited *supra*.
Lawrence *v.* Martin, 22 Cal. 174, 178.
Warren *v.* Warren Thread Co., 134 Mass. 247, 248, 249.
Rogers *v.* Spence, 13 M. & W. 571, 580.
Jordan *v.* Gillen, 44 N. H. 424, 426.
Sibbald's Estate, 18 Penn. St. 249, 255.
Sommer *v.* Wilt, 4 Serg. & Rawle, 19, 28.
Gillan *v.* Gillan, 55 Penn. St. 430, 432.

Thus, in Sibbald's case, 18 Penn. St. 249, 255, a man's pecuniary claim against the United States for unlawfully preventing him from cutting his own timber upon his own land was held to be a personal tort, and not to pass in bankruptcy. The Court says this is "a mere wrong, which took no property from the party injured, and from which the wrong doer derived no benefit," and consequently "it was neither 'estate, credits nor effects,' and therefore passed not to assignees" (18 Penn. St. 255). The act of the Confederate cruisers in raising the defendants in error's

cost of insurance on shore, by threatening American ships and cargoes generally on the ocean, is far less an injury to property, and far more a personal injury to us, than the injury in Sibbald's case. It is as much so as it would be for one man to increase the cost of food and clothing to another by making it dangerous, with arms or animals, for him to buy at any store near him, and compelling him to go elsewhere at extra expense to get the articles at higher prices.

The same principle is illustrated by the cases which hold that a power of revocation or appointment in a grant of either real or personal property does not pass in bankruptcy, but is personal to the person in whom it is vested.

Jones *v.* Clifton, 101 U. S. 225, 230, 231.
Brandies *v.* Cochrane, 112 U. S. 344.

Even an interest in tangible property, or in a contract, in order to be assignable, must be a vested one, and not contingent except as to a single contingency, to wit, the death of the beneficiary, — which is sure to happen some time, — happening before a given event.

Putnam *v.* Story, 132 Mass. 205, 210.
Ex parte Dever, 18 Q. B. D. 660.

In Putnam *v.* Story, 132 Mass. 205, 210, while it was held that, under a devise of a remainder to the heirs of a life-tenant, the expectancy of an *heir-apparent* would pass in bankruptcy, it was said that the expectancy of an *heir-presumptive* would not so pass. The war-premium claimants in 1875 were in the latter rather than the former position, for there were several contingencies and several prior claimants between them and success, such as the exculpated cruiser claimants, the insurance companies, and others.

In *ex parte* Dever, 18 Q. B. D. 660, just cited, a woman insured her husband's life for her own benefit in 1876. The policy provided that on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal holder should have the option of withdrawing in cash the policy's entire share of the assets, *i. e.*, the accumulated reserve and surplus appropriated by the Society to the policy. In 1883-84 the husband went into bankruptcy and was discharged, and in 1886 the wife exercised the option, and the question was, whether the money went to his creditors. He had paid premiums from 1876 to 1883, and she from 1883 to 1886. The Court held it was unnecessary to decide whether, as between the husband and wife, the money belonged to one or the other, because they held that — even assuming it to belong to the husband by reason of his payment of premiums or otherwise — still the husband's interest in 1883–84 being *doubly* contingent did not pass in bankruptcy.

Lord Esher, M. R. (page 665): "The contingency of its (the option's) being exercised was *a mere possibility*, which could be of no value to anybody, and was not property of the bankrupt which passed to his trustee."

Bowen, L. J., page 668: "This was not an option which he could exercise (I believe it has been held that an option which a bankrupt may exercise does pass to his creditors), it was *nothing more than a chance which the bankrupt had that his wife might, out of several alternatives, adopt one which might be for his benefit if she did adopt it.* . . . Such a possibility is not 'property' of a bankrupt which passes to his creditors."

Frye, L. J.: "Now what was the nature of that marital right, if it existed at all? It could only arise in the event of

the policy not having been previously terminated either by lapse or death. *If either of those two contingencies had happened, the option to receive the accumulations in cash could not arise.* And if the option did arise, it was an option to adopt one or other of four alternatives. How could the interest of the husband be 'property' when it was something which could only occur in the event of *the exercise of the wife's option on a double contingency*, which had not happened at the time when he obtained his discharge? How could it be said that any 'property' was vested in him at the time of his dicharge? *It was the mere hope of a hope that something might come to him* by reason of his surviving the ten years and of his wife's exercising her option in that particular manner. It was a mere *spes*, and there was nothing which could vest in the trustees in the bankruptcy."

It is evident that our "hope of a hope," or "mere *spes*," in 1875, was slenderer and more contingent than that of the husband in the above case. The contingencies that there *might* be some of the Geneva award left over, and that Congress *might* conclude to give it to some Alabama "claimants', instead of turning it into the Treasury, and that Congress *might* give it to us instead of giving it to the insurance companies and other claimants, were certainly more remote and hypothetical than the chance that the husband might live ten years and that his wife might exercise a pecuniary option in his favor. It might fairly be said that there was no comparison between the two cases from the point of view of the doctrine of chances.

6. Even when a legal right originally existed, if it has been forfeited and subsequently the forfeiture has been waived or remitted and bankruptcy has intervened between the forfeiture and the remission, the assignee does not take.

Kittridge *v.* McLaughlin, 33 Me. 327.
Ward *v.* Webster, 9 Daly, 182.

In analogy with the cases last cited, — assuming that Messrs. Heard's "claim" against Great Britain was originally a legal right, — it was negatived and barred by the Geneva tribunal's decision in 1872, which was final (Art. XI., *supra*, pages 2, 3), and their possible "claim" against the United States was negatived by the Act of 1874, which expressly and pointedly left them out; the Act of 1882 waives or remits this effect of the Act of 1874. The assignees, under an intervening bankruptcy in 1875, can, on the principle of the cases just cited, take nothing.

7. If these subsequent grants of pensions and allowances, or remissions of forfeitures, "related back," as the Alabama Court urges that the grant of war-premiums by the Act of 1882 does, or if the "moral obligation" was sufficient, all the cases just cited would have had to be decided the other way. The only test that can be deduced from the authorities and from sound legal principle is that a legal right, not a mere claim, must exist at the moment of bankruptcy. Most, if not all, admitted bounties, gratuities, pensions and gifts are founded upon some moral or equitable obligation, and "dispense justice" rather than distribute alms. They are none the less gratuities in the eye of the law. If the existence of such an antecedent obligation made them legal rights, then they should all be assignable, and all the cases holding that they are not assignable are wrongly decided.

Conclusion.

If such a line is not drawn, and drawn at the particular point we are contending for, it is difficult to see what barrier exists to prevent all the acquisitions of a discharged bankrupt, even in his old age, from the liberal bounty of his country or from the kindness of his friends, being swallowed up by the assignee in bankruptcy of his early youth, and